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43083—25——1

In the Supreme Court of the United States

OCTOBER TERM, 1924

THE UNITED STATES OF AMERICA, petitioner
v.
NEW YORK AND CUBA MAIL STEAMSHIP Company, respondent
} No. 392

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT CUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

I

STATEMENT

By authority of the Act of December 26, 1920, entitled "An Act to provide for the Treatment in Hospital of Diseased Alien Seamen" (41 Stat. 1082), the Government brought an action at law against the owner of the S. S. *Yucatan,* a registered United States merchant vessel employed as a common carrier of freight between ports of the United States and the West Indies and Mexico, to recover the hospital expenses for treating an alien member of the crew found upon arrival at New York to be afflicted with a loathsome disease. The seaman, a

citizen of Chili, had signed shipping articles for a voyage from New York to Cuba, West Indies, Gulf of Mexico and return. Upon the arrival of the vessel back at New York, on order of the Commissioner of Immigration, the seaman found afflicted was placed in the hospital at Ellis Island and later discharged as cured. The statute provides:

> Alien seamen found on arrival in ports of the United States to be afflicted with any of the disabilities or diseases mentioned in Section 35 of the Act of February 5, 1917, entitled "An Act to regulate the immigration of aliens to, and the residence of aliens in, the United States," shall be placed in a hospital designated by the immigration official in charge of the port of arrival and treated, all expenses connected therewith * * * to be borne by the owner, agent, consignee, or master of the vessel. * * *

A demurrer was interposed which presented the question of the liability of an American shipowner under this Act to pay such medical or hospital expenses of alien seamen. It was asserted that the liability imposed by the Act of December 26, 1920, was to be limited to owners of foreign ships and did not include owners of American ships.

The District Court (Knox, D. J.), adopting the opinion of *Castner, Curran & Bullitt, Inc.* v. *Hamilton, Collector of Customs,* 275 Fed. 203 (D. C., E. D. of Va.; Groner, D. J.), held the American

vessel owner responsible and overruled the demurrer. It considered the Act an immigration measure and held an alien seaman to be any seaman not a native-born or naturalized citizen of the United States. (R. pp. 5, 6.) The Circuit Court of Appeals reviewed the question on writ of error and in an opinion by Manton, C. J. (R. p. 9) reversed the judgment of the District Court. It held that the phrase "alien seamen" used in the statute included only seamen employed on foreign vessels and did not include any alien who was employed on a United States vessel. It denied that the statute should be read and applied as an immigration measure, but considered it a seamen's statute to be read and applied in accordance with the settled maritime law, which regards foreigners employed as seamen on merchant vessels of the United States as seamen of the United States. The same doctrine regards American seamen employed upon foreign ships as foreign seamen. It denied its application to citizens or subjects of other countries (aliens) while employed on United States ships.

The matter is now on review in this court on writ of certiorari.

II

The statutes in question

The Act of December 26, 1920 (41 Stat. 1082), reads as follows:

> An Act to Provide for the Treatment in Hospital of Diseased Alien Seamen.

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, that *alien seasen found on arrival in ports of the United States* to be afflicted with any of the disabilities or diseases mentioned in section 35 of the Act of February 5, 1917, entitled "An Act to regulate the immigration of aliens to, and the residence of aliens in, the United States," shall be placed in a hospital designated by the immigration official in charge at the port of arrival and treated, all expenses connected therewith, including burial in the event of death, to be borne by the owner, agent, consignee, or master of the vessel, and not to be deducted from the seamen's wages, and no such vessel shall be granted clearance until such expenses are paid or their payment appropriately guaranteed and the collector of customs so notified by the immigration official in charge: *Provided,* That *alien seamen* suspected of being afflicted with any such disability or disease may be removed from the vessel on which they arrive to an Immigration station or other appropriate place for such observation as will enable the examining surgeons definitely to determine whether or not they are so afflicted, all expenses connected therewith to be borne in the manner hereinbefore prescribed:

Provided further, That in cases in which it shall appear to the satisfaction of the immigration official in charge that it will not be

possible within a reasonable time to effect a cure, the return of the *alien seamen* shall be enforced on or at the expense of the vessel on which they came, upon such conditions as the Commissioner General of Immigration, with the approval of the Secretary of Labor, shall prescribe, to insure that the *aliens* shall be properly cared for and protected, and *that the spread of contagion shall be guarded against.* (Italics ours.)

III

Related legislation

This act is companion legislation to the Act of February 5, 1917, entitled "An Act to regulate the immigration of aliens to and the residence of aliens in the United States" (39 Stat. 874). The related sections are (all italics ours):

SEC. 1. * * * That the word "*alien*" wherever used in this act *shall include any person not a native-born or naturalized citizen of the United States;* * * * that the term "*seamen*" as used in this act *shall include every person signed on the ship's articles and employed in any capacity on board any vessel arriving in the United States from any foreign port or place.*

SEC. 2. There shall be levied, collected, and paid a tax of $8 for every alien, including alien seamen, regularly admitted as provided in this act entering the United States. * * *

SEC. 31. That any person, including the owner * * * of any vessel arriving in

the United States from any foreign port or place, who shall knowingly sign on the ship's articles or bring to the United States as one of the crew of such vessel any alien. * * *

SEC. 32. That no alien excluded from admission into the United States by any law * * * and employed on board any vessel arriving in the United States from any foreign port or place, shall be permitted to land.

SEC. 33. That it shall be unlawful and deemed a violation of the preceding section to pay off or discharge any alien employed on board any vessel arriving in the United States from any foreign port. * * *

SEC. 34. That *any alien seaman* who shall land in a port of the United States contrary to the provisions of this act shall be deemed to be unlawfully in the United States. * * *

SEC. 35. That it shall be unlawful for any vessel carrying passengers between a port of the United States and a port of a foreign country, upon arrival in the United States, to have on board employed thereon any alien afflicted with idiocy, imbecility, insanity, epilepsy, tuberculosis in any form, or a loathsome or dangerous contagous disease, if it appears to the satisfaction of the Secretary of Labor, from an examination made by a medical officer of the United States Public Health Service, and is so certified by such officer, that any such alien was so afflicted at the time he was shipped or engaged and taken on board such vessel and that the existence of such affliction might have been detected by means of a competent medical ex-

amination at such time; and for every such alien so afflicted on board any such vessel at the time of arrival the owner, agent, consignee, or master thereof shall pay to the collector of customs of the customs district in which the port of arrival is located the sum of $50, and pending departure of the vessel the alien shall be detained and treated in hospital under supervision of immigration officials at the expense of the vessel; and no vessel shall be granted clearance pending the determination of the question of the liability to the payment of such fine and while it remains unpaid: *Provided*, That clearance may be granted prior to the determination of such question upon the deposit of a sum sufficient to cover such fine: *Provided further*, That such fine may, in the discretion of the Secretary of Labor, be mitigated or remitted.

SEC. 36. That upon arrival of any vessel in the United States from any foreign port or place it shall be the duty of the owner * * * to deliever to the principal immigration officer in charge of the port of arrival lists containing the names of all aliens employed on such vessel, stating the positions they respectively hold in the ship's company, when and where they were respectively shipped or engaged * * * and before the departure of any such vessel it shall be the duty of such owner * * * to deliver to such immigration officer a further list containing the names of all alien employees who were not employed * * *.

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The Immigration Act of May 26, 1924 (43 Stat. 153), known as the "Quota visa Act," provides:

> SEC. 19. No alien seamen excluded from admission into the United States under the Immigration laws and employed on board any vessel arriving in the United States * * * shall be permitted to land in the United States, except temporarily for medical treatment or pursuant to such regulations as the Secretary of Labor may prescribe * * *.
>
> SEC. 20. The owner * * * of any vessel arriving in the United States from any place outside thereof who fails to detain on board any alien seamen employed on such vessel until the Immigration officer in charge at the port of arrival has inspected such seamen * * * or who fails to detain such seamen on board after such inspection or to deport such seamen if required, shall pay * * *.
>
> SEC. 28 (b). As used in this act, the term alien excludes any individual not a native-born or naturalized citizen of the United States. * * *

By authority of the Act the Department of Labor adopted certain rules known as Immigration Rules of May 1, 1917. (See Government Publication, Immigration Laws, Rules of May 1, 1917, 6th Edition, September, 1921.) Rule 10 (p. 49 of the publication) is:

> Subdivision 1. *Who are seamen.*—(*a*) The term "seaman" as used in this act shall include every person signed on the ship's articles and employed in any capacity on board any vessel arriving in the United States from any foreign port or place (sec. 1). In the seamen sections (secs. 31-36) the terms "member of the crew," "alien employed on board," "alien seaman," and "alien employee" are used as synonymous with the word "seaman" as defined in the act. Wherever such words or terms are used in this rule or in the immigration act they shall have the meaning above given. Only aliens who come within such definition shall be treated in the special

IV

ARGUMENT

The plain reading of the Act makes it applicable to all vessels. The Act is an immigration measure. Its purpose, *inter alia*, is "*that the spread of contagion shall be guarded against*" by requiring proper medical examination of alien seamen arriving at any port of the United States. Where any alien seaman is found afflicted with any idiocy, imbecility, insanity, epilepsy, tuberculosis in any form or a loathsome or dangerous contagious disease, the Act requires such alien seaman to be placed in a hospital for cure at the expense of the ship. Where cure is improbable in a reasonable time, the return of the seaman may be enforced at the expense of the vessel. The alien seaman here was cured, and the present action is to recover from the owner of the vessel the hospital bill for effecting the cure.

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manner herein specified. The cases of all others shall be handled in accordance with the general requirements of the immigration act and of other immigration rules herewith promulgated or in accordance with the treaty, laws, and rules governing the admission of Chinese.

Subd. 2. *Collection of head tax.*—(*a*) The head tax shall be collected on "alien seamen regularly admitted as provided in this act." (Sec. 2.) If the seaman shall be discharged in a United States port by the master or any other officer of the vessel "bringing such alien to the United States," and thereupon shall be regularly admitted, the tax shall be paid by the "master, agent, owner, or consignee of the vessel" or "transportation line" responsible under section 2.

(*b*) If the seaman lands without being discharged and voluntarily applies to the immigration officials for examination, or is apprehended after entering without inspection and examined, and as a consequence of either examination is admitted, the seaman shall be required to pay the tax himself as a condition precedent to his regular admission. But the same exception that applies to alien passengers from the insular possessions shall apply to cases arising hereunder.

(*c*) "Regularly admitted" means admitted with intentions not to reship foreign and in accordance with the terms of this rule.

Subd. 3. (*e*) A card register of arriving seamen shall be prepared and kept in the following manner: Masters or other officers of vessels in the foreign trade shall furnish each alien seaman in their employ

THE SUBJECT MATTER OF THE ACT OF DECEMBER 26, 1920, IS IMMIGRATION

It was admitted in the District Court that if the Act of December 26, 1920, is to be considered a part of the general immigration laws the demurrer was not well founded (R. p. 6). The Act was drafted by the Department of Labor and considered by both the Senate and the House as an immigration measure and referred to and acted upon by the Committees on Immigration. While not in terms an amendment to the Immigration Act of February 5, 1917, it is companion legislation and may be read to extend the responsibility of the steamship lines for the expenses of treatment of

with a card containing his name, age at date of issue, nationality, personal description and his photograph.

(f) No seaman shall be allowed by an immigrant inspector to land from a vessel, either temporarily or permanently, without being registered in the foregoing manner and furnished with an identification card, unless he presents such a card showing that he already has been registered. If any owner, agent, consignee, or master of a vessel pays off or discharges or fails to retain on board any alien who has not been given the inspection required by this rule such vessel thereby becomes liable to prosecution for the penalty prescribed by sections 32 and 33, and steps to that end shall be taken at once by the immigration official in charge.

Subd. 4. *Medical examination.*—*(a)* All alien seamen arriving in ports of the United States shall be medically examined, as far as practicable, aboard ship each time they arrive. Such examination shall be similar to that made in the cases of alien passengers.

Subd. 5. *Exclusion and hospital treatment of mentally or physically afflicted.*—No seaman afflicted with idiocy, imbecility, insanity, epilepsy, tuberculosis in any form, or a loathsome contagious or dangerous contagious disease shall be permitted to land permanently in a port of the United States, and a seaman so afflicted shall be permitted to land temporarily only in the event that he is entitled to receive, or the circumstances are such as to require for humane or sanitary reasons that he shall be afforded, treatment in either a public-health or other hospital. (Secs. 32 and 35.) If a certificate requiring the vessel to be fined is issued in accordance with section 35, the seaman shall be detained and treated in hospital designated by the immigration official in charge "at the expense of the vessel." If such a certificate is not rendered, or the case is not covered by section 35, arrangements shall be made for the treatment of the seaman in a marine hospital or in a contract hospital of the Public Health Service, the expense to be borne by the marine hos-

alien seamen aboard cargo vessels which, by Section 35 of the Immigration Act of February 5, 1917, had been limited to vessels carrying passengers. There can be no question that Section 35 applies to both foreign and American vessels. The diseases and disabilities mentioned in Section 35 are: " Idiocy, imbecility, insanity, epilepsy, tuber-

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pital fund in the cases of those who are "beneficiaries" of such fund, and to be guaranteed and paid, and the payment enforced, in accordance with the regulations of the Public Health Service in the cases of those employed on foreign vessels. If an afflicted seaman shall be cured of any other disability than insanity before deportation becomes practicable, he shall be accorded the inspection prescribed in subdivision 6 hereof. * * *

Subd. 11. *Seamen returned to United States under consular regulations.*—Aliens employed as seamen on vessels of American registry are entitled under the navigation laws to certain privileges, including that of being returned to the United States when discharged in a foreign port on account of injury or illness or when they become destitute under certain circumstances in foreign countries. Even though such seamen arrive as passengers or as workaways, their cases shall be disposed of in accordance with the provisions of this rule. If necessary, the cost of photographs in such cases shall be borne from the appropriation for the enforcement of the immigration act.

Subd. 12. *Disabled seamen.*—A disabled alien seaman, who nevertheless does not intend to relinquish his calling but whom the master of the vessel is obliged under the navigation laws of the country to which the vessel belongs to return to the country where he embarked, may, under such regulations as the officer in charge deems proper to carry out the purposes of this subdivision, pass through the United States in transit to such country by the most expeditious and direct route.

The Department of Labor adopted the following regulations to govern in the application of the Act of December 26, 1920. (See Immigration Laws, 6th Edition, September, 1921, p. 109.)

DEFINITIONS

1. The expression "*alien seamen*" shall be taken to mean *all seamen of alien nationality.*

2. The expression "*arriving at ports in the United States*" shall be taken to mean arriving at ports in continental United States from a foreign port or place. If a vessel arrives foreign at a port of the United States and later, on the same voyage, touches at other ports of the United States, she will for the purpose of this definition be regarded as arriving foreign at such other ports.

3. The expression "*afflicted seamen*" shall mean *alien seaman* afflicted with any of the diseases or disabilities enumerated in section 35 of the Immigration Act. (Italics ours.)

culosis in any form, or a loathsome or dangerous contagious disease." *The term "alien seamen" has been defined and used only in immigration acts and in the regulations prescribed by the Bureau of Immigration of the Department of Labor for the enforcement of the provisions of such acts.* Considered as an immigration measure, it is clear to us that alien seamen must be read to include any seaman of alien nationality whether employed on foreign or American vessels.

The obvious purpose of both Section 35 of the Immigration Act of February 5, 1917, and the Act of December 26, 1920, was to protect the American public against the spread "of contagion" and to prevent diseased alien seamen from becoming a charge upon the Government.

We have carefully examined the statutes related to seamen, shipping commissioners, and shipment of seamen, duties of consular officers, consular regulations, and all related subjects, as well as the decisions of the courts. These statutes, regulations, and cases refer to seamen either as foreign seamen or American seamen—seamen of the United States. The expression "alien seamen" occurs only in immigration acts and regulations, and decisions construing and applying them.

MEANING OF THE TERM ALIEN SEAMEN

We suggest that the term alien seamen, as used in the Act of December 26, 1920, has precisely the same meaning as given by the Immigration Act of

February 5, 1917, and regulations applying such Acts. That meaning is "aliens who are seamen" and who, because they are seamen and liable at any time to touch our shores, are likely to become and do become serious immigration problems. In that sense they are no less aliens because employed on American vessels. An alien is an alien, whether employed as a seaman or otherwise and regardless of the nationality of the vessel. An alien serving as seaman on board a foreign ship is, as respects this country, both a foreign seaman and an alien seaman. If he becomes a member of the crew of an American ship, he ceases to be classed a foreign seaman and has certain rights and privileges as an American seaman, but he is none the less an alien seaman. An American citizen serving as seaman on board an American ship is, as respects this country, neither a foreign seaman nor an alien seaman. If he becomes a member of the crew of a foreign ship, he becomes a foreign seaman but not an alien seaman. It may be entirely accurate to say that a foreign seaman is a seaman who is not an American seaman, for these two terms are used as opposites. The same individual can be and often is at one and the same time an American seaman and an alien seaman, which is the case where an alien is regularly signed as a member of the crew of an American vessel.

The maritime law does classify seamen as either American or foreign by the nationality of the vessel on which they ship. Such declarations have been

made in cases which involve the immediate contractual relation for wages or demands growing out of the contracts of shipment or the settled application of benefits created by the seamen's statutes or the consular regulations related thereto. These decisions do declare that seamen on American vessels are American seamen under the protection and subject to the laws of the United States; that seamen on foreign vessels are foreign seamen and under the protection and subject to the laws of the country of the vessel's flag. Our review of all these cases and of statutes and consular or other regulations applicable thereto definitely classifies seamen as either seamen of the United States or foreign seamen. We have not found any of these statutes or decisions which applies or considers the term alien seamen. To the contrary, the words "alien seamen" are defined and considered only in immigration statutes and regulations and have acquired the definite meaning "aliens who are seamen." These rules and regulations have uniform application as immigration measures, and every seaman of foreign nationality, as well as the vessel and owners, must comply with all such rules and regulations whether the vessel is an American vessel or a foreign vessel. While admitting that the maritime law does define foreign and American seamen and declares the flag of the vessel fixes the rule applicable for disputes growing out of the relation of vessel and seamen, we do not agree that

these decisions are applicable or that they do declare that the words "alien seamen" are to be read "foreign seamen," or that the words "American seamen," meaning seamen aboard an American vessel, excludes alien seamen. This is true whether the Act of 1920 in question is considered an immigration measure or not. In either instance the expression "alien seamen" must be read to mean any seamen who are not native or naturalized citizens of the United States.

We emphasize that the problems suggested do not involve the rights of seamen. They are questions of the obligations of ship owners who ship aliens as seamen. The alien seaman is fully protected. The present question is, has Congress by the statute imposed the cost of his treatment upon the owner of an American vessel? If under the doctrine of *In re Ross*, 140 U. S. 453, the alien American seaman on American vessels was, prior to this statute, entitled to free cure at the expense of the Government, it was entirely competent for Congress to change the rule; and as a condition for the employment of alien seamen on American vessels, to provide that American ship owners as well as foreign ship owners who bring diseased aliens into our ports do so at their own risk and must bear the expense of their treatment. This is precisely what the 1920 act has accomplished. The alien seaman has under this act precisely the same protection as before. The effect of the statute is to transfer the expense of his cure for certain dis-

abilities and diseases from the public to those responsible for his presence in our ports. That Congress intended such result is apparent from the plain language used. It applies to aliens on all ships.

THE CASES

Three different district courts have construed the act to read as the Government has applied it.

> *Castner, Curran & Bullitt, Inc.* v. *Hamilton, Collector*, 275 Fed. 203, (E. D. of Va., Groner, J.).
>
> *Franco, et al* v. *Seas Shipping Corporation, Inc.*, 272 Fed. 542 (D. C. of Md., Rose, C. J.).
>
> *New York & Cuba Mail Steamship Co.* (S. D. N. Y., Knox, D. J.) R. 6.

These decisions are contrary to the rulings of the Circuit Court of Appeals in this case. We quote from the opinion in *Castner, Curran & Bullitt* v. *Hamilton* (275 Fed. pp. 204, 205):

> (1) On behalf of petitioners (vessel owners) it is insisted that the term "alien seamen," used throughout the act, has no reference or application to members of the crew of an American vessel, even though they be aliens; that by settled maritime law a seaman on an American vessel is an "American seaman," and therefore not an "alien seaman," whatever his citizenship may be; and that the act consequently applies only to the crews of foreign ships. In support of this view the cases of In re Ross,

140 U. S. 453, 11 Sup. Ct. 897, 35 L. Ed. 581, the Blakeley (D. C.) 234 Fed. 959, The Laura M. Lunt (D. C.) 170 Fed. 204, The Santa Elene (D. C.) 271 Fed. 347, The Marie (D. C.) 49 Fed. 286, The Kestor (D. C.) 110 Fed. 432, The Eudora (D. C.) 110 Fed. 430, and The Ester (D. C.) 190, Fed. 216, are cited as controlling. These cases hold that service on an American vessel makes the person so serving, whatever his nationality, for the time being an "American seaman," and as such entitled to the protection and subject to the obligations of the laws passed by Congress on behalf of American seamen. Counsel for the petitioner urge with considerable force and plausibility that, if due effect be given to this doctrine, the crews of American vessels, wherever their permanent allegiance may be, are eliminated from the provisions of the act; for, they say, a person may not be an American seaman and an alien seaman at one and the same time.

This position might be tenable if the act could be regarded as original legislation complete in itself; for under such circumstances it would, perhaps, not be going too far to say that Congress, in the use of the descriptive term found in the act, had in mind the change in the alien's status while serving on an American vessel, and intended to give effect to the same. But in the view that I take of the matter the object and purpose of Congress in passing the act of 1920 was not, as claimed by petitioner, to enact a

seaman's benefit statute, but to supply an omission in the existing immigration law (Act Feb. 5, 1917), and to make certain of the provisions of that law applicable to cargo vessels as well as to passenger ships; the particular provisions being those contained in section 35 regarding the detention and treatment at the expense of the vessel of diseased alien members of a crew of any vessel carrying passengers between a port of the United States and any foreign port, to prevent thereby the spread of loathsome and contagious diseases, and to place all aliens, whether found on American or foreign vessels, freight as well as passenger, under the jurisdiction of the immigration officials, because the public safety required it.

It is true the act of 1920 is not in terms an amendment of the former act; but by reference, as well as by reason of the subject matter treated, it is so interrelated with it that it seems impossible to escape the conclusion that Congress by its passage intended to make the penalties of section 35 of the old law apply to all vessels alike, and that this object was the real purpose of the legislation. The most casual consideration of the act of 1917 shows that Congress made no distinction in the terms "aliens" and "alien seamen." Throughout they are used interchangeably. In the section immediately preceding section 35 provision is made that any *alien seaman* (italics added) who shall land in a port of the United States contrary to the provisions of this act shall be deemed to

be unlawfully in the United States, etc. It can not, of course, be contended that this section is inoperative as applied to aliens who were of the crew of American vessels, or that their employment on such vessels entitled them by virtue of that fact to entry into the United States on any other or different footing than an alien otherwise employed. Reference to other sections of the former act but fix this conclusion more definitely, and confirm the view that the words "alien" and "alien seamen," as used there, are synonymous terms, and that though the alien may become for many purposes, by virtue of his signing on an American vessel, an American seaman, he nevertheless continues, so far as the laws relating to immigration are concerned, both an alien and an alien seaman.

That it was competent for Congress to legislate so as to include both classes of aliens, or, in fact, all classes of aliens, wherever employed, can not, of course, be questioned; and it seems to me equally clear that the descriptive language employed in the act of 1920 was intended to have the same meaning as in the earlier immigration statute which, as has been seen, it was designed to supplement and correct. In both statutes the term "aliens" and "alien seamen" must be held to have been used as commonly accepted and understood. It follows that the contention of petitioner that the rule pronounced by the Supreme Court in the Ross Case should be held applicable, and there-

> fore controlling, is for the reasons stated overruled.

In *Franco* v. *Seas Shipping Corporation, Inc.*, 272 Fed. 542, the court said (Rose, C. J.):

> * * * It is true that, without explanation of the reasons for such legislation, it may seem unfair for the Congress to impose upon the owners of ships the duty of paying hospital bills to cure alien seamen of diseases due to their own vices, but the courts may not substitute their judgment for that of Congress.
>
> The act declares that all expenses connected with the hospital treatment, as well as some other things, shall be borne by the owner, agent, consignee, or master of the vessel "and not to be deducted from the seaman's wages." Such language is too clear to require construction.

The fact that the statute provides, among other things, for the return of incurable alien seamen and no return of the seaman here involved could be made because he was originally signed on at an American port does not, as urged in the lower courts, suggest a clear reason for restricting the act to foreign vessels. In the first place, no return of the seaman was sought; and secondly, the alleged doctrine that the nonapplication of certain provisions of a law to a person or entity takes such person or entity entirely out of the statute was held without merit in *United States* v. *Union Supply Company*, 215 U. S. 50, 54, 55. Moreover, the

same difficulty to return the seaman would be encountered if the statute should be restricted to foreign vessels and such seaman shipped at an American port. It is to be observed, however, that the statute authorizes return not only on the vessel which brought the seaman here but " at the expense of the vessel." This latter provision would take care of the contingency here dealt with. *Castner, Curran & Bullitt, Inc.*, v. *Hamilton* (*supra* p. 206).

LEGISLATIVE HISTORY OF THE ACT

It is only fair to say that when the act was discussed in the House, there were some expressions when the measure was considered a second time in a latter session by the representative in charge to the effect that the act was not intended to apply to American ships. By its plain terms the act applies to all vessels. We see no ambiguity in its wording. The report of the House Committee on Immigration makes its meaning clear:

> The bill simply provides that the care and treatment in hospital of diseased alien seamen be placed on the same basis as the care and treatment in hospital of diseased aliens, namely, at the expense of the ship or steamship company bringing the diseased alien seamen to this country.

Steamship owners of American and foreign vessels, by the Act of 1917, are responsible for the hospital bills of diseased aliens. The same Act (sec. 35) makes such owners responsible for the bills of alien seamen of passenger vessels of both

foreign and American registry. The letter sent with the bill by the Acting Secretary of Labor to the Chairman of the House Committee on Immigration definitely suggests that such hospital accounts are to be borne by steamship lines and vessels, irrespective of the vessel's nationality. (See note.)

H. R. 7930, entitled "An Act to Provide for the Treatment in Hospital of Diseased Alien Seamen," introduced in the House by the Chairman of the Committee on Immigration and Naturalization and referred "to the Committee on Immigration and Naturalization" (Cong. Rec. 66th Congress, First Session, p. 3292). The Committee's report (id. House Report 173) reads:

The Committee on Immigration and Naturalization, to which was referred the bill (H. R. 7930) to provide for the treatment in hospital of alien seamen, begs leave to report same to the House without amendments.

The bill simply provides that the care and treatment in hospital of diseased alien seamen be placed on the same basis as the care and treatment in hospital of diseased aliens, namely, at the expense of the ship or steamship company bringing the diseased alien seamen into this country. At present there is a difference of opinion as to who shall pay the expenses of taking care of these alien seamen who come here and require medical or surgical treatment. The following letter explains the urgent necessity for the enactment of this legislation:

DEPARTMENT OF LABOR,
OFFICE OF THE SECRETARY,
Washington, July 28, 1919.

Hon. ALBERT JOHNSON, M. C.,
Chairman Committee on Immigration and Naturalization,
House of Representatives.

MY DEAR MR. JOHNSON: Referring to the conversation which the Commissioner General of Immigration had with you this morning, there is transmitted herewith a draft of a bill which this department is very anxious to have enacted into law, with a view definitely to fix the responsibility of steamship lines and vessels for the expenses which arise from the frequent necessity of placing in hospitals alien seamen who, upon arrival at our ports, are found to be afflicted with various diseases, often of a loathsome or dangerous contagious character and who under the provisions of sections 31 to 36 of the immigration act of February 5, 1917, can not properly and legally be permitted to remain on board the vessels and spread contagion or otherwise produce undesirable results with regard to other persons on board.

The existing law is not clear upon the matter of placing the responsibility for these expenses, and while the department has not encountered very much difficulty so far in a satisfactory handling of the matter, it has been impossible in a few instances to collect bills arising from hospital treatment, and now that normal conditions with regard to shipping are rapidly being resumed, it is anticipated that

As the wording of the act is free from ambiguity and its plain reading places responsibility on all vessels (foreign and American) and as the House report approving the bill does make it applicable to all vessels, the act must be construed and applied as its plain reading requires. General observations in the course of debates are not available to suggest any contrary construction. We read the debates in the House when the bill was originally passed (Cong. Rec., 66th Congress, First Session, p. 3377) as definitely determining that the act was companion legislation to the Immigration Act of 1917 and intended to impose upon every vessel employing alien seamen arriving at a port in the United States the same responsibilities which the Act of 1917 imposed with respect to aliens landed by such vessel. Under the 1917 Act, such expenses

---

unless the proposed provision should be enacted many difficulties and embarrassments will arise.

Very truly yours,

JOHN W. ABERCROMBIE,
Acting Secretary.

The enactment of this legislation without delay will save the Government a considerable sum of money, as the number of diseased alien seamen arriving here requiring treatment is on the increase since the armistice.

ISAAC SIEGEL.

The bill was discussed by the House (id. p. 3377) and as amended passed (id. 3379). The bill was referred by the Senate to the Committee on Immigration (id. p. 3393) and was reported by that committee back to the Senate with amendments (Cong. Rec., 66th Congress, second session, p. 8084). The bill was discussed by the Senate (Cong. Rec. 66th Congress, third session, p. 410) and with amendments passed (id. pp. 600, 601). The amended bill was considered by the House (id. pp. 600, 601) and passed and approved. The debates on the floor of the House may be read to suggest that the act did not relate to American vessels. The plain meaning of the act does make it applicable to both American and foreign vessels. It is proper to notice that the bill was originally passed by the House at the first session of the Sixty-sixth Congress in June, 1919, and the amended bill at the second session on December 20, 1919.

are made payable by every vessel, American or foreign, bringing aliens to this country.

THE OPINION OF THE CIRCUIT COURT OF APPEALS

We do not consider it necessary to review the opinion of the Circuit Court of Appeals, which is based upon the ruling of *In re Ross,* 140 U. S. 453, and followed in numerous cases. These cases regard all seamen regularly shipped on an American ship as American seamen in the sense that such seaman becomes entitled to the benefit of our law relating to seamen aboard United States vessels and subjects them to all its obligations and liabilities; and, conversely, that an American citizen serving on board a foreign ship as a member of its crew is entitled to like benefits and subject to the same obligations with respect to the law of the flag under which the vessel sails. Rights of seamen are involved. None of these cases consider or apply the term alien seamen.

The constitutionality of the Act is definitely determined by the decisions of this Court.

Oceanic Steam Navigation Co. v. *Stranaham* (Immigration Act, 1903), 214 U. S. 320.

United States v. *Nord Deutcher Lloyd* (Sec. 19, Immigration Act, 1907, denying vessel's right to take security for expenses paid by vessel or return fare), 223 U. S. 512.

Turner v. *Williams* (exclusion of aliens who are anarchists under Act, 1903), 194 U. S. 279.

Weber v. *Freed* (prohibiting importation of prize-fight pictures), 239 U. S. 325.

Patterson v. *Bark Eudora* (prohibiting paying advances to seamen on foreign ship), 190 U. S. 169.

Sandberg v. *McDondald* (Seamen's Act, 1915, prohibiting advances), 248 U. S. 185.

Neilson v. *Rhine Shipping Co.* (id.), 248 U. S. 205.

Butterfield v. *Stranahan* (limiting importation of tea), 192 U. S. 470.

We read the Act of 1920 to be an immigration measure, companion legislation of the Immigration Act of 1917, which defines an alien seaman and declares him to be any seaman employed on any vessel arriving at our ports who is not a native-born or naturalized American citizen. So considered the hospital expenses are charges to be borne by American vessel owners, as such legislation requires.

CONCLUSION

It is respectfully submitted that the judgment of the Circuit Court of Appeals for the Second Circuit should be reversed and the judgment of the District Court reaffirmed and made the judgment of this Court.

Respectfully submitted.

JAMES M. BECK,
Solicitor General.

J. FRANK STALEY,
Special Assistant to the Attorney General in Admiralty.

○

(Supreme Court, U.S.
FILED
MAY 29 1926
WM. R. STANSBU
Clerk

Supreme Court of the United States

OCTOBER TERM, [redacted] 1925

No. ~~1033~~ [redacted] 65

UNITED STATES OF AMERICA,

Petitioner,

against

NEW YORK & CUBA MAIL STEAMSHIP COMPANY,

Respondent.

STATEMENT OF RESPONDENT ON PETITION FOR WRIT OF CERTIORARI.

MARK W. MACLAY,
JOHN THURSTON CARPENTER,
Counsel for Respondent, New York & Cuba Mail Steamship Company.

The Rieds Press, 49 Warren St., N. Y. Tel. Barclay 4800.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1923.

UNITED STATES OF AMERICA,
(Plaintiff, Defendant-in-Error)
Petitioner,

against

NEW YORK & CUBA MAIL STEAMSHIP COMPANY,
(Defendant, Plaintiff-in-Error)
Respondent.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The respondent does not oppose the petitioner's application for a writ of certiorari, and concurs in the petitioner's contention that this case deserves review by this court.

There is a diversity between the construction of the Act of December 26th, 1920, 41 St. 1082, adopted by the Circuit Court of Appeals for the Second Circuit, in this case, and that adopted by the District Courts in the Fourth Circuit (*Franco et al.* v. *Seas Shipping Corp.* 272 Fed. 542, *Castner, Curran & Bullitt, Inc.* v. *Hamilton*, 275 Fed. 203).

The respondent is informed and believes that the Department of Labor intends to apply the construction adopted by the Circuit Court of Appeals for the Second Circuit only in that jurisdiction,

and to adhere to its own construction of the statute in other jurisdictions, unless the matter is otherwise determined by decision of this court.

WHEREFORE, the respondent respectfully submits that this case is a proper one for review by this court.

New York City, May 28, 1924.

Respectfully submitted,

MARK W. MACLAY,
JOHN TILNEY CARPENTER,
Counsel for Respondent.

FILED
OCT 7 1925
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1925

No. 65

THE UNITED STATES OF AMERICA
Petitioner

against

NEW YORK & CUBA MAIL STEAMSHIP COMPANY
Respondent

BRIEF FOR THE RESPONDENT

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Supreme Court of the United States

OCTOBER TERM, 1925

THE UNITED STATES OF AMERICA, Plaintiff, Defendant-in-Error, Petitioner, against NEW YORK & CUBA MAIL STEAMSHIP COMPANY, Defendant, Plaintiff-in-Error, Respondent.	No. 65

BRIEF FOR THE RESPONDENT

STATEMENT OF THE PROCEEDINGS

The opinion below is reported in 297 Fed. 158.

This cause is in this Court on a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, granted June 9, 1924, R. 14,* on the petition of the United States praying review on the ground that:

1. There is a diversity between the construction of the Act of Congress of December 26, 1920, 41

* Unless otherwise indicated the references are to pages of the printed record.

Stat. 1082, adopted by the Circuit Court of Appeals for the Second Circuit in this case and that adopted by the District Courts in the Fourth Circuit in *Franco et al.* v. *Seas Shipping Corp.*, 272 Fed. 542, and *Castner, Curran & Bullitt, Inc.* v. *Hamilton,* 275 Fed. 203;

2. The Department of Labor has always adhered to the construction of the statute adopted in the Fourth Circuit;

3. The statute in question manifests a purpose on the part of Congress to compel all shipowners to bear the expense of medical treatment of alien seamen like the one here involved; and

4. The large aggregate annual expense involved in the medical treatment of alien seamen should not be made a burden upon the public revenues unless this court expresses the view that the statute here in issue intends that result.

The date of the judgment to be reviewed is February 25, 1924. R. 14.

This action was brought at law by the United States of America against the respondent to recover the sum of $83.25 for the expenses of maintaining and treating a seaman, one Victor Moreno, at the U. S. Immigration Station, Ellis Island. Respondent is the owner of the S. S. *Yucatan,* a duly registered United States merchant vessel engaged in the common carriage of cargo. Victor Moreno, a citizen of the Republic of Chile, was a member of its crew, having signed regular shipping articles at New York for a voyage to Cuba, the West Indies, Gulf of Mexico and return. The vessel returned to New York with Moreno on board

on July 18, 1921, at which time, at the order of the Commissioner of Immigration, Moreno was delivered to Ellis Island, because he was found to be afflicted with venereal disease. He was treated at Ellis Island from July 19th to August 25th, 1921, when he was discharged as cured. This suit was brought to recover from the American shipowner the expenses of such maintenance and medical treatment under the Act of Congress approved December 26, 1920, c. 4, 41 Stat. 1082. *Complaint*, R. 2-4. This statute is as follows:

> "AN ACT TO PROVIDE FOR THE TREATMENT IN HOSPITAL OF DISEASED ALIEN SEAMEN.
>
> Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, that alien seamen found on arrival in ports of the United States to be afflicted with any of the disabilities or diseases mentioned in section 35 of the Act of February 5, 1917, entitled, 'An Act to regulate the immigration of aliens to, and the residence of aliens in, the United States,' shall be placed in a hospital designated by the immigration official in charge at the port of arrival and treated, all expenses connected therewith, including burial in the event of death, to be borne by the owner, agent, consignee, or master of the vessel, and not to be deducted from the seamen's wages, and no such vessel shall be granted clearance until such expenses are paid or their payment appropriately guaranteed and the collector of customs so notified by the immigration official in charge: *provided*, That alien seamen suspected of

> being afflicted with any such disability or disease may be removed from the vessel on which they arrive to an immigration station or other appropriate place for such observation as will enable the examining surgeons definitely to determine whether or not they are so afflicted, all expenses connected therewith to be borne in the manner hereinbefore prescribed: *Provided further*, That in cases in which it shall appear to the satisfaction of the immigration official in charge that it will not be possible within a reasonable time to effect a cure, the return of the alien seamen shall be enforced on or at the expense of the vessel on which they came, upon such conditions as the Commissioner General of Immigration, with the approval of the Secretary of Labor, shall prescribe, to insure that the aliens shall be properly cared for and protected, and that the spread of contagion shall be guarded against."

The respondent's motion to dismiss the complaint on the ground that it did not state facts sufficient to constitute a cause of action was argued on July 13, 1922, before the Hon. John C. Knox, D. J., who denied the motion and filed an opinion on August 3, 1922, in which he held that under the Act of December 26, 1920, the owner of an American vessel was liable for such expenses incurred at the instance of the immigration officials, even though the foreign seaman on whose behalf the expenses were incurred was regularly signed on the articles at an American port as a *bona fide* member of the crew of a vessel of the United States. *Opinion*, R. 5-7.

Judgment was entered on May 12, 1923, R. 4-5, against the respondent, which brought it by writ

of error, allowed August 30, 1923, R. 1, 7, to the United States Circuit Court of Appeals for the Second Circuit.

The writ of error was argued on February 7, 1924, before Honorable Charles M. Hough, Martin T. Manton and Julius Mayer, Circuit Judges. On February 18, 1924, the Circuit Court of Appeals handed down an opinion reversing the judgment of the District Court and granting respondent's motion to dismiss the complaint. *Opinion,* R. 9-13; *Judgment,* R. 14.

The Circuit Court of Appeals held in substance that the Act of December 26, 1920, should be read and applied in accordance with the settled maritime law under which seamen are regarded as of the nationality of the vessel on which they serve; that as so construed the term "alien seamen" in the Act has no application to seamen of foreign nationality employed on American vessels; that the statute should be given no broader construction than its language and clear intent require; that the absence of plain language making the statute applicable to foreign seamen employed on United States vessels, the presence of certain provisions which are meaningless or absurdly onerous as applied to such seamen, and the explanation by the spokesman of the committee having the bill in charge when it was under consideration by the House of Representatives, all indicate that Congress did not intend to depart from the understanding of alien or foreign seamen as settled in the maritime law; that there is not any reason to construe this statute in accordance with the definitions in the Immigration Laws or the Regulations thereunder; and that "if applicable to United

States vessels the instant legislation here imposed an obligation of doubtful constitutionality." R. 12. The opinion concluded "that the statute in question has no application to citizens of other countries while employed on United States ships and is intended to apply only to seamen of foreign ships." *Opinion*, R. 13.

On the grounds stated by the Circuit Court of Appeals, the respondent asks for an affirmance of its judgment.

As the respondent owns and operates numerous vessels, the importance of this appeal to it, and to American shipowners generally, is, of course, far out of proportion to the amount of money claimed in the complaint.

FIRST POINT

AS A GENERAL PRINCIPLE, SEAMEN PARTAKE OF THE NATIONALITY OF THE SHIPS UPON WHICH THEY ARE EMPLOYED.

A. *All seamen, including aliens, regularly employed on vessels of the United States, are "American seamen."*

It is a well-recognized principle of the maritime law that the national character of seamen is determined, not by their citizenship, but by the nationality of the ship upon which they serve. This principle was laid down by this court in respect of United States consular jurisdiction, where the seaman in question was a British subject. *In re Ross*,

1890, 140 U. S. 453. At page 472 the court, by Mr. Justice Field, said:

> "The national character of the petitioner, for all the purposes of the consular jurisdiction, was determinable by his enlistment as one of the crew of the American ship Bullion. By such enlistment he becomes an American seaman—one of an American crew on board of an American vessel—and as such entitled to the protection and benefits of all the laws passed by Congress on behalf of American seamen, and subject to all their obligations and liabilities. Although his relations to the British government are not so changed that, after the expiration of his enlistment on board of the American ship, that government may not enforce his obligation of allegiance, and he on the other hand may not be entitled to invoke its protection as a British subject, that relation was changed during his service of seaman on board of the American ship under his enlistment. He could then insist upon treatment as an American seaman, and invoke for his protection all the power of the United States which could be called into exercise for the protection of seamen who were native born * * *."

The court then quoted a communication from the Secretary of State to the British government in part as follows:

> "The mercantile service is certainly a national service, although not quite in the sense in which that term would be applied to the national navy. It is an organized service, governed by a special and complex system of law, administered by national officers, such as collectors, harbor masters, shipping

masters and consuls, appointed by national authority. This system of law attaches to the vessel and crew when they leave a national port and accompanies them round the globe, regulating their lives, protecting their persons and punishing their offences. The sailor, like the soldier during his enlistment, knows no other allegiance than to the country under whose flag he serves" p. 473.

In regard to the foregoing, this court said:

"This rule, that the vessel being American is evidence that the seamen on board are such, is now an established doctrine of this country; and in support of it there is with the American people no diversity of opinion and can be no division of action.

We are satisfied that the true rule of construction in the present case was adopted by the Department of State in the correspondence with the English government, and that the action of the consular tribunal in taking jurisdiction of the prisoner Ross, though an English subject, for the offence committed, was authorized. While he was an enlisted seaman on the American vessel, which floated the American flag, he was, within the meaning of the statute and the treaty, an American, under the protection and subject to the laws of the United States equally with the seaman who was native born" p. 479.

This principle has been followed by the Department of State in administering statutory provisions relating to seamen, through the Consular Service, which is governed by the Consular Regulations. These regulations are not available in full, but their substance is found in a *Digest of Consular Regulations Relating to Vessels and Seamen,* pub-

lished by the Government Printing Office in 1921. The following are believed to be all the definitions of American seamen in this digest.

Consular Regulation 199 defines American seamen for the purposes of the administration of the laws relating to discharge, wages and extra wages of seamen as: "1. Citizens of the United States regularly shipped on American vessels in any ports," "2. Foreigners regularly shipped on American vessels in ports of the United States," and "3. Foreigners who have declared their intention of becoming American citizens, and who have thereafter served three years on American vessels, regardless of the port of shipment." *Digest of Consular Regulations,* p. 17.

It will be observed that the seaman in the present case falls exactly within the second group, and therefore should not be deemed to be an alien seaman.

The same policy of regarding seamen as partaking of the nationality of the vessel on which they are shipped is found in the Consular Regulations with respect to the rights to extra wages to which foreign seamen are not entitled.

> "b. Foreigners who have acquired the character of American seamen and have not lost that character, are entitled to extra wages in the same manner as American citizens. C. R., 248.
>
> c. Foreigners acquire the character of American seamen by shipping on American vessels in ports of the United States. C. R., 249.
>
> 1. This character is retained by successive reshipments on American vessels abroad. C. R., 249.

2. Foreigners who desert from an American vessel without cause lose their character of American seamen. C. R., 250.

3. Foreigners who abandon the calling of seamen lose their character of American seamen. C. R., 249.

4. Foreigners shipping on foreign vessels lose their character of American seamen. C. R., 249.

5. A foreigner who has divested himself of the character of an American seaman cannot regain that character except by returning to the United States and reshipping on an American vessel. C. R., 249" *Digest of Consular Regulations,* pp. 31, 32.

Revised Statutes, Section 4577, which provides for the repatriation of destitute American seamen, has been construed both by the Consular Regulations and by Judge Story as covering seamen of foreign nationality on American vessels.

By the provisions of Section 4577, consular officers are required "to provide for the seamen of the United States who may be found destitute within their district, * * * subject to such instructions as the Secretary of State shall give." In determining who are "seamen of the United States," Consular Regulation 260 of the Department of State provides that American citizens who are members of the American Merchant Marine, seamen who have declared their intention to become American citizens, and have served on American vessels three years, and "c. Foreigners regularly shipped in an American vessel in a port of the United States," are entitled to relief under this provision. *Digest of Consular Regulations,* p. 37.

Revised Statutes, Sections 4577 and 4578, were formerly the Act of February 28, 1803, c. 9, 2 Stat. 204. Section 4578 provides a penalty upon masters of American vessels who fail to comply with the orders of the consul given under Section 4577. A suit to enforce such a penalty against a master for failing to comply with the orders of the consul in respect of a British subject who became destitute while on a merchant vessel of the United States necessitated a finding as to whether the seaman fell within the provisions of the Act of 1803. Judge Story held that foreigners while employed as seamen in merchant ships of the United States are "mariners and seamen of the United States within the language and policy of the Act of 1803" *Matthews* v. *Offley,* 1837, 3 Sumn. 115; Fed. Cas. No. 9290, 16 F. C. 1131.

A more recent decision as to the status of destitute seamen is to the same effect. *The Santa Elena,* S. D. N. Y., 1920, 271 Fed. 347. In that case the captain of the *Santa Elena* was requested by the United States Consul at Barbados to bring back to the United States a seaman who had been discharged from an American vessel at Barbados. The seaman in question was a Swede. The captain complied, signed him on the articles, and on arrival at New York sent him to the Marine Hospital, Staten Island, on account of sickness. The Government claimed the landing thus permitted by the vessel was an unlawful entry of this alien into the United States in violation of the Immigration Act under which recovery of a penalty against the ship was sought. The defense was based on the character of the seaman as an American seaman. Judge Knox held that under the provisions regarding destitute

seamen referred to above "Even aliens employed as seamen on vessels of American registry are * * * subject to special rules that are not applicable to aliens who are not what may be termed 'American seamen.'" P. 349. Judge Knox concluded that on arrival at New York this Swede was entitled to receive medical treatment at the Marine Hospital as an American seaman, and that in giving him that to which he was entitled, the vessel was relieved from liability for unlawful entry.

Likewise, it was held by Judge Foster in *The Laura M. Lunt*, 1909, 170 Fed. 204, that all sailors on an American vessel "should be held to be American seamen regardless of nationality." P. 205.

In *The Blakeley*, 1916, 234 Fed. 959, the court, citing *In re Ross*, 140 U. S. 453, held:

> "The fact that libelant is not a citizen of the United States does not change his relation to the act, as engaging in the service as one of the crew of the American ship *Blakeley* brought him within the protection and benefits of all of the laws passed by Congress on behalf of American seamen, and subject to all of their obligations and liabilities." P. 961.

From the foregoing authorities, it is quite evident that both in legislation and decisions bearing on the rights and obligations of seamen, aliens or foreigners employed on American vessels are considered as American, not as alien, seamen. It remains to consider the converse situation where a citizen of the United States is employed as a seaman on a foreign vessel.

B. *Citizens of the United States while employed as seamen on foreign ships are "alien seamen."*

Notwithstanding the natural tendency of American courts to extend the benefits of American laws to American citizens, the doctrine that service on a ship changes temporarily the allegiance and the nationality of all the crew to that of the vessel's flag, has been adhered to; and therefore American citizens have been denied the benefits and released from the obligations of American citizens during the period of their service on a foreign ship.

In *Rainey* v. *N. Y. & P. S. S. Co.*, C. C. A. 9th, 1914, 216 Fed. 449, a citizen of the State of Washington who signed on the articles of a British ship was killed in the course of his duties as engineer by reason of the alleged unseaworthiness of the vessel, or negligence of the bareboat charterer, a Connecticut corporation. Suit was brought by the seaman's administratrix, who was also a citizen and resident of the State of Washington. Exceptions to the libel raised the question as to whether the death statute of the State of Washington gave the deceased's widow the right to maintain the action. The District Court gave a decree for the respondents, and the libelant appealed.

In affirming the decree of the District Court the Circuit Court of Appeals for the Ninth Circuit held that even though the libelant and the deceased were American citizens and residents of the State of Washington, the libelant did not have any right to the recovery of damages for the death by wrongful act of a seaman on a British ship. Ross, C. J., said at page 454:

> "When Rainey, although a citizen of the State of Washington, went before the British Consul at Seattle, and signed the shipping articles, and thereupon stepped upon the British ship flying the British flag as a member of its crew, as the record shows he did, he stepped upon British territory and became entitled to the protection and benefit of all British law in behalf of British seamen, and subject to all of its obligations and liabilities."

Judge Ross quoted at great length from *In re Ross*, 140 U. S. 453, and it is therefore quite clear that the *Rainey* case establishes the converse of *In re Ross*, and that each of these cases makes plain the fundamental principle that the character of a seaman as an American or alien is determined, not by his individual nationality, but by the nationality of his vessel.

On the same principle, an American citizen who shipped at an American port on a Norwegian vessel, was held to be for the time being a Norwegian, and therefore his claim for wages fell within the exclusive jurisdiction of the Norwegian Consul in accordance with the terms of a treaty between the United States and Norway. *The Marie*, 49 Fed. 286.

The Ester, 190 Fed. 216, and *The Albergen*, 223 Fed. 443, are to the same effect.

Both in the case of an alien individual serving as a seaman on an American vessel, and also in the case of an American individual serving as a seaman on a foreign vessel, legislation relating to seamen, administrative regulations concerning seamen, and

decisions of the courts on the subject, all determine the nationality of a seaman by the nationality of the vessel on which he serves; and therefore the term "alien seamen" means every seaman, whether alien or native, who is employed on a foreign ship, and should not be construed to refer to any seaman, whether alien or native, while employed on an American vessel.

SECOND POINT

THE ACT OF DECEMBER 26, 1920, SHOULD BE CONSTRUED IN ACCORDANCE WITH THE GENERAL DOCTRINE OF NATIONALITY OF SEAMEN.

A. *The drastic and highly penal character of this Act require a strict construction.*

The statute of December 26th, 1920, provides that if a vessel, on arrival in a port of the United States, has on board an "alien seaman" afflicted with certain disabilities or diseases, the shipowner must pay all expenses of medical treatment, "and no such vessel shall be granted clearance until such expenses are paid or their payment appropriately guaranteed." The shipowner is therefore not merely subjected to a charge to be collected by normal commercial methods by the government, with resort to the courts in case the shipowner refuses to pay, but he is made absolutely liable for the expenses of treating diseased "alien seamen" without any opportunity to be heard as to the duration of the treatment or the amount of his liability. Until he pays or guarantees to pay the cost of maintenance and treatment, to the satis-

faction of the Secretary of Labor, his ship cannot move out of the harbor. The owner will be deprived of the right to do business, insofar as that vessel is concerned, unless he undertakes to discharge his liability even before the extent of his indebtedness is ascertained. Furthermore, the statute purports to deprive the owner of his only redress, of deduction of such expenses from wages, against seamen who, as in the case at bar, have caused the loss by their own wilful misconduct. Again, it purports to make the owner "return" the seaman at the instance of the immigration officials without any opportunity for a hearing.

The statute should therefore be given no broader construction than its language and clear intention require. *Steam Engine Co.* v. *Hubbard,* 1879, 101 U. S. 188; *Chase* v. *Curtis,* 1885, 113 U. S. 452; *Moffitt* v. *U. S.,* C. C. A. 9th, 1904, 128 Fed. 375.

B. *The language and clear intention of the statute do not require application to American shipowners.*

The statute by express terms is limited to "alien seamen," but it contains no definition of those words. It will be noticed that the word "alien" prefixes the word "seamen" wherever the former is used in the Act, with the single exception of the last proviso "to insure that the aliens shall be properly cared for and protected." "The aliens" there referred to must be the persons mentioned in the main body of the statute, namely, "alien seamen." It is plain that the term "alien seamen" must be defined as one phrase, and the application of the Act must be governed by this definition.

Congress did not use the words "aliens employed on board any vessel arriving in the United States," or "seamen who are aliens," or "alien seamen employed on a foreign vessel, or a vessel of the United States," or the phrase used in immigration statutes, "any aliens employed on any vessel arriving in the United States from any foreign port or place." On the contrary, care was taken to use the term "alien seamen." It is not only sound statutory construction, but also sound common sense, to conclude that in the absence of clear language making the Act of December 26, 1920, applicable to a foreign seaman on an American ship, it was not intended to depart from the settled definitions of "alien" or "foreign" seamen in order to visit on American shipowners these drastic penalties.

C. *The provision of the statute for the return of incurable cases is clear as applied to seamen on foreign ships, but is meaningless or absurdly unjust if applied to an alien person shipped at a United States port on an American vessel.*

The Act provides that "in cases in which it shall appear to the satisfaction of the immigration official in charge that it will not be possible within a reasonable time to effect a cure, the return of the alien seamen shall be enforced on or at the expense of the vessel on which they came." In the case at bar, as the seaman was signed on in New York, on an American vessel, for a voyage to Cuba and return to New York, if he could not have been cured within a reasonable time, under the construction for which the Government contends, the respondent's obligation would have been to "return" him to the port of departure, where the ship

first received him on board, which is an absurdity, because he is there already.

The only other possible construction of the word "return" would be that the statute required the shipowner to send this seaman back to Chile, to which country the *Yucatan* never went, and to which the respondent maintains no service. The obvious injustice and absurdity of this alternative was recognized by Judge Groner in *Castner, Curran & Bullitt, Inc.* v. *Hamilton*, 275 Fed. 203, who characterized such an intention on the part of Congress as "not thinkable." 275 Fed. 203, 206. In that decision, relied on by the petitioner, Judge Groner virtually admitted that the provision for return of incurable cases should not be applied to any seamen on American ships, and seemed confident that the courts might be relied on to deny the effectiveness of the Act in that regard. It is difficult to see, however, how the words "alien seamen" in the same paragraph of the same statute, apparently used with the same meaning, could be made effective in respect of seamen employed on American ships, in one part of the Act, and made ineffective in respect of exactly the same class of persons and ships in another part of the Act, except by extraordinary and unjustified judicial legislation, which would do violence not only to ordinary canons of construction, but to common sense interpretation of language.

It is always to be presumed that a statutory provision has some meaning. If "alien seamen" throughout the Act is construed to mean "seamen on alien ships," it would not be unreasonable to require the vessel which brought such a seaman to a United States port to take him back to the port from which both vessel and seaman started for the

United States, and, as so construed, the meaning of this provision is plain and its effect reasonable.

The Circuit Court of Appeals, therefore, concluded that Congress did not intend this statute to apply to American ships. *Opinion,* R. 12.

This conclusion is attacked by the petitioner on the ground that as demand for the return of this particular seaman had not been made, the construction of the provisions for return was not before the court; and on the further ground that the lack of applicability of certain provisions of a law to a particular person or entity does not take such person or entity entirely out of the statute. *Petitioner's Brief,* p. 20.

Each of the propositions relied on are in themselves sound but neither leads to the conclusion that such a provision should not be regarded in determining the legislative intent. Indeed, one of the cases cited in the petitioner's brief is authority to the contrary. *Neilson* v. *Rhine Shipping Co.,* 1918, 248 U. S. 205, 213. In that case, this court held that a provision in the Seamen's Act of 1915, Chapter 153, 38 Stat. 1164, denying clearance papers to vessels violating its terms, which could apply only to domestic ports, is evidence of the intent of Congress to limit the prohibition against advance payment of seamen's wages to advances made in our own ports. It is to be noted that advances in domestic ports had not been made and were not in question in that case.

Both *United States* v. *Union Supply Co.,* 1909, 215 U. S. 50, cited by the petitioner, and *Neilson* v. *Rhine Shipping Co., supra,* depend on the same fundamental canon of construction that a statute must be construed, if possible, as a harmonious

whole, and in such a way as to give effect to all its parts. This principle of statutory construction is peculiarly applicable to the Act of December 26, 1920, because the entire statute is a closely knit whole, and a unit in itself. In fact, it is drawn not only in a single paragraph, but in a single sentence, and the particular part of the Act under which this suit is brought is modified by two provisos, one of which is that relating to return of incurable cases.

As the second proviso cannot be given effective meaning unless the words "alien seamen" throughout the Act be construed as not applying to seamen on American vessels, that is a sufficient reason for the construction adopted by the Circuit Court of Appeals.

Finally, if "it is not thinkable" that the American shipowner engaged in foreign trade should be required to return a diseased alien to the distant country from which he originally came, it is certainly "not thinkable" that Congress intended American vessels in the coastwise service, employing aliens who contract one of the specified disabilities or diseases during the voyage, to be required to return them to their distant native land. Yet if the term "alien seamen" means persons who individually are aliens, even though they are seamen on an American vessel, the Act necessarily applies to coastwise shipping.

On the other hand, the construction contended for by the respondent would exempt coastwise shipping from the purview of the Act of December 26, 1920. It is submitted that there is not the slightest indication that Congress intended, as Judge Groner said, "to extend its terms so as to impose upon American shipping, already heavily

burdened, absurd or impossible conditions," 275 Fed. 203, 206; and that there is every reason to believe that the intention of Congress was quite the contrary.

D. *The legislative history of the Act shows that it was intended to apply to foreign ships, and not to seamen of any individual nationality on vessels of the United States.*

In construing a statute, when the meaning of its terms is ambiguous, it is permissible for the court to consult the proceedings and reports of the legislators in order to ascertain their intention. *Duplex Printing Press Co.* v. *Deering,* 1921, 254 U. S. 443. In that case, Mr. Justice Pitney, delivering the opinion of the court, said at page 474:

> "By repeated decisions of this court it has come to be well established that the debates in Congress expressive of the views and motives of individual members are not a safe guide, and hence may not be resorted to, in ascertaining the meaning and purpose of the law-making body. *Aldridge* v. *Williams,* 3 How. 9, 24; *United States* v. *Union Pacific R. R. Co.,* 91 U. S. 72, 79; *United States* v. *Trans-Missouri Freight Association,* 166 U. S. 290, 318. But reports of committees of House or Senate stand upon a more solid footing, and may be regarded as an exposition of the legislative intent in a case where otherwise the meaning of a statute is obscure. *Binns* v. *United States,* 194 U. S. 486, 495. And this has been extended to include explanatory statements in the nature of a supplemental report made by the committee member in charge of a bill in course of passage. *Binns* v. *United States,* supra; *Pennsylvania R. R. Co.* v. *International Coal Co.,*

230 U. S. 184, 198-199; *United States* v. *Coca Cola Co.*, 241 U. S. 265, 281; *United States* v. *St. Paul, Minneapolis & Manitoba Ry. Co.*, 247 U. S. 310, 318.

* * * * * *

"Moreover, the report was supplemented in this regard by the spokesman of the House committee (Mr. Webb) who had the bill in charge when it was under consideration by the House. The question whether the bill legalized the secondary boycott having been raised, it was emphatically and unequivocally answered by him in the negative."

The Act of December 26, 1920, originated as a bill in the House of Representatives, *H. R. 7930;* was amended in the Senate and passed on December 16, 1920, *Congressional Record,* Dec. 16, 1920, 66th Congress, 3rd Session, p. 416; and was passed in the House, with the Senate amendments on December 21, 1920, *Congressional Record,* Dec. 21, 1920, 66th Congress, 3rd Session, pp. 621, 622. The report of the committee to the House of Representatives (Report No. 173, 66th Congress, 1st Session; House Reports, Vol. I, 1919) which was presented before the bill was extensively amended, uses the term "alien seamen" without giving any definition thereof.

While the letter sent with the bill by the Acting Secretary of Labor to the Chairman of the House Committee on Immigration when the bill was first introduced many months before final passage, and the other preliminary discussions of the bill referred to in the petitioner's brief, pages 21-23 and notes, perhaps should not be resorted to in ascer-

taining the meaning and purpose of the lawmaking body because they are not safe guides, *Aldridge* v. *Williams, supra; U. S.* v. *Union Pacific R. R. Co., supra; U. S.* v. *Trans-Missouri Freight Association, supra;* yet even those expressions of individual views do not contain any definition of the term "alien seamen" or any indication that the proposed legislation was intended to apply to American shipowners.

However, preceding the final passage of the bill, as amended by the Senate, the purpose of the legislation was explained to the House of Representatives by Mr. Johnson, the Representative in charge of the measure, who answered certain inquiries as follows:

> "MR. JOHNSON of Washington. Mr. Speaker, this bill was passed by the House on July 30, 1919. It is a necessary measure, in my opinion, growing out of certain conditions in the Department of Labor connected with the examination of sick sailors, in order that part of the expense of their maintenance shall be borne by the owners of foreign ships coming to these ports bringing the sailors.
>
> "MR. HICKS. Mr. Speaker, will the gentleman yield?
>
> "THE SPEAKER pro tempore. Does the gentleman from Washington yield to the gentleman from New York?
>
> "MR. JOHNSON of Washington. Yes; but I thought I would make a brief statement first.
>
> "MR. HICKS. I would be glad if the gentleman would make a statement, because I am free to confess that I do not know what is the purpose of this bill, and what these amendments do.

"MR. JOHNSON of Washington. I will try to explain them. Let me read the bill. * * *

(The bill was then read.) P. 621.

* * * * * *

"MR. HICKS. Does this provide that the expense shall be borne as it is now? Does the bill put the expense on the ship owner instead of on the Marine Hospital Service?

"MR. JOHNSON of Washington. This provides that the sick alien seaman shall remain in the charge of the immigration officials and not permitted to step out if they are sick, and if incurable must go back in the vessel on which they shipped.

"MR. HICKS. In other words, they are maintained at the expense of the ship owner until they are given a clean bill of health and discharged?

"MR. JOHNSON of Washington. Yes; discharged from the hospital. That is the whole purpose of the bill. It will result in a saving of money and will put the sick sailors in charge of the Public Health officials.

* * * * * *

"MR. FOCHT. Does that include both foreign ships and American ships?

"MR. JOHNSON of Washington. American ships take care of their sick seamen.

"MR. FOCHT. But under the provisions of this bill both will be included?

"MR. JOHNSON of Washington. No; this bill refers to alien seamen.

* * * * * *

"MR. JOHNSON of Washington: * * * This is a bill made necessary after an attempt to carry out these things, in order to save the United States anywhere from $200,000 annually on up, according to the number of sick sailors from alien ships. That is all there is to it." P. 622.

The so-called defect in the existing statutes which this statute was intended to cure, was that the United States, instead of the owners of foreign ships, had been bearing the expense of examination, treatment, etc., of "sick sailors from alien ships," and the bill sought to cure the defect and "to save the United States anywhere from $200,000 annually on up, according to the number of sick sailors from alien ships," by placing the expense of maintenance on "the owners of foreign ships coming to these ports bringing the sailors." As Mr. Johnson said at page 622, "That is all there is to it."

A similar purpose is indicated in the report of the House Committee on the first introduction of the bill. *Congressional Record,* 66th Congress, 1st Session, p. 3292, *House Report, No. 173,* Vol. I, 1919, quoted in the notes to pages 22 and 23 of the petitioner's brief.

So far as the point involved in the present case is concerned, the intention of Congress was made perfectly clear by the direct question by one of the representatives as to whether the bill included both "foreign ships and American ships." Mr. Johnson's reply was "No; this bill refers to alien seamen." It is evident from the colloquy as a whole that "alien seamen" was used by Mr. Johnson as synonymous with seamen on foreign ships, or in his own words: "Sick sailors from alien ships." There is no escape from Mr. Johnson's direct answer of "No" to Mr. Focht's inquiry as to whether "both foreign ships and American ships" will be included under the provisions of the bill.

THIRD POINT

THE RELATION, IF ANY, BETWEEN THE ACT OF DECEMBER 26, 1920, AND THE IMMIGRATION LAWS, DOES NOT REQUIRE THE CONSTRUCTION OF "ALIEN SEAMEN" TO MEAN "ALIEN INDIVIDUALS EMPLOYED AS SEAMEN ON AMERICAN VESSELS."

The principal reason for reversing the judgment urged in the petitioner's brief is that the Act of December 26, 1920, is "an immigration measure, companion legislation of the Immigration Act of 1917," *Brief*, p. 25; and that, therefore, the term "alien seamen" should be construed in accordance with the special definitions of that term in the Act of 1917 and in departmental regulations thereunder. The petitioner's argument, however, in support of this contention does not dispose of the sound reasoning of the opinion of the Circuit Court of Appeals.

A. *The Act of December 26, 1920, is not an amendment of the Immigration Act.*

In one of the two cases chiefly relied on by the petitioner, *Franco et al.* v. *Seas Shipping Corp.*, 1921, 272 Fed. 542, a libel was brought by two foreigners employed as members of the crew of an American cargo vessel to recover their wages without deduction of the amount of the hospital bills for their compulsory treatment in a hospital under the Act of December 26, 1920. In support of their claim to deduct these expenses from the seamen's wages, the shipowners urged that the Act of 1920 was merely an amendment to the Immigration Act

of 1917 and that, therefore, as the Act of 1917 was limited to passenger vessels, the application of the Act of 1920 should similarly be limited. Judge Rose held:

> "I can see nothing in the terms of the Act of December 26, 1920, to sustain this contention." P. 542.

Therefore, he denied the shipowners' right to make the deduction.

Hence, this case was correctly cited by the Circuit Court of Appeals for the proposition that the Act of 1920 may not be considered as part of the immigration laws. *R.* 13.

In the other case relied on by the petitioner, *Castner, Curran & Bullitt, Inc.* v. *Hamilton,* 1921, 275 Fed. 203, the dicta quoted extensively in the petitioner's brief, pp. 16-20, express the view that the Act of 1920 was so inter-related with the Act of 1917 that the two should be construed together; but it is clearly stated that the Act of 1920 is not an amendment of the Act of 1917. 275 Fed. 205.

The discussion of the Act of December 26, 1920, in Judge Groner's opinion quoted in the petitioner's brief, was not necessary to the decision because the proceeding was an application for a writ of mandamus to compel the Collector of Customs to grant a clearance; and it is clear that the District Court did not have jurisdiction to issue such a writ. *Vacuum Cleaner Co.* v. *Platt,* C. C. A. 2nd, 1912, 196 Fed. 398; *In re Higdon,* 1920, 269 Fed. 150; *U. S.* v. *Nashville etc. Ry. Co.,* 1914, 217 Fed. 254. Those cases, and others decided since the Judicial Code of 1911, follow the reasoning of the earlier cases: *M'Intire* v. *Wood,* 1813, 7 Cranch. 504;

Knapp v. *Lake Shore Ry. Co.*, 1905, 197 U. S. 536; *Covington Bridge Co.* v. *Hager*, 1906, 203 U. S. 109.

B. *The subject matter of the Act of December 26, 1920, relates to seamen and public health rather than to immigration.*

The Act of 1920 may well be regarded as original legislation, complete in itself, and there does not seem to be any cogent reason why this statute should be considered an integral part of any particular group of laws. It does not relate to persons coming into the country as immigrants, but to seamen and to the protection of public health.

The second proviso concerning return of incurable cases, is stated to be for the purpose of insuring "that the aliens shall be properly cared for and protected, and that the spread of contagion shall be guarded against." This purpose is one reasonably to be classified under seamen's legislation, or under health legislation, rather than under Immigration Acts.

One of the important features of the statute is the prohibition against the deduction of the expenses placed on the owner, from the seaman's wages. Such a provision is clearly one for the benefit of the seaman, and does not connote anything whatever with respect to immigration.

"Seamen" are not "immigrants," and the Immigration Laws do not apply to seamen in the absence of an express provision to that effect. *Scharrenberg* v. *Dollar S. S. Co.*, 245 U. S. 122; *Taylor* v. *U. S.*, 207 U. S. 120; *Moffitt* v. *U. S.*, C. C. A. 9th, 1904, 128 Fed. 375; *U. S.* v. *Burke*, 99 Fed. 895; *U. S.* v. *Sandrey*, 48 Fed. 550. Therefore the present statute should not be considered as an Immi-

gration Law in the absence of an express provision that the seamen referred to therein are to be treated as immigrants, or that the provision itself is to be considered as an amendment to, or as a part of the Immigration Laws.

C. *The title and form of the Act of 1920 distinguish it from the immigration statutes.*

The title, "To provide for the treatment in hospital of diseased alien seamen," might indicate that the Act of December 26, 1920, was intended to be part of the Marine Hospital Public Health Legislation, or part of the statutes regarding seamen, but there is nothing about the title or the text to indicate an intention to make this statute a part of the Immigration Law.

On the other hand, in passing what are undoubtedly immigration measures, Congress has in the following instances defined the character of the legislation as such in the title:

By joint resolution approved October 19, 1918, aliens honorably discharged from certain specified military service were permitted under certain conditions to be readmitted, notwithstanding the provisions of Section 3 of the Immigration Act. This joint resolution is entitled "Joint Resolution authorizing the readmission to the United States of certain aliens * * *." *Resolution, Oct. 19, 1918, No. 44, c. 190,* 40 Stat. 1014.

Legislation with respect to anarchists and similar aliens was approved October 16, 1918, and amended by Act approved June 5, 1920. The titles of both statutes appear in the amendment as follows: "That Section 1 of the Act entitled 'An Act to exclude and expel from the United States aliens

who are members of the anarchistic and similar classes,' approved October 16, 1918, is amended to read as follows:" *Act of Cong., Oct. 16, 1918, c. 186,* 40 Stat. 1012; *Act of Cong., June 5, 1920, c. 251,* 41 Stat. 1008.

The place in our laws of the Act of May 10, 1920 appears clearly from its title, "An Act to deport certain undesirable aliens, and to deny re-admission to those deported." *Act of Cong., May 10, 1920, c. 174,* 40 Stat. 593.

An exception to the rules of admissibility of aliens was made by the Act of June 5, 1920, which is entitled "An Act to amend Section 3 of an Act entitled 'An Act to regulate the Immigration of Aliens * * *,' approved February 5, 1917." *Act of Cong., June 5, 1920, c. 243,* 41 Stat. 981.

The form of the statutes clearly intended to be part of the Immigration Laws, as compared with the form of the Act of 1920, sustains the conclusion of the Circuit Court of Appeals.

D. *References in the statute to immigration are unimportant.*

The reference to Section 35 of the Act of February 5, 1917 is merely a convenient method of listing the disabilities or diseases to which the statute should apply. The language incorporates absolutely nothing from Section 35 except "the disabilities or diseases mentioned" therein.

The Act also provides that the Immigration Official in charge at the port of arrival shall designate the hospital in which the sick seaman shall be placed, and that such seamen may be detained for observation at an Immigration Station or other appropriate place. The Immigration Official in

charge is also charged with determining whether the case is curable within a reasonable time. The placing of these administrative functions with the Bureau of Immigration does not indicate anything as to the general intention of the statute. It certainly is not any reason to construe it in accordance with the different language used in Section 35.

E. *The Act of 1920 differs from the Immigration Act, §35, in respect of the persons and vessels described and the conditions of liability.*

The dicta of Judge Groner in denying the application for a writ of mandamus in *Castner, Curran & Bullitt, Inc.* v. *Hamilton*, 1921, 275 Fed. 203, quoted in the petitioner's brief, pp. 16-20, go so far as to specify that the omission in the existing immigration laws which the Act of 1920 was said to supply was in the provisions of Section 35 of the Act of February 5, 1917, 39 Stat. 896. This section provides that:

> "It shall be unlawful for any vessel carrying passengers between a port of the United States and a port of a foreign country, upon arrival in the United States, to have on board employed thereon any alien afflicted with * * * if it appears to the satisfaction of the Secretary of Labor, from an examination made by a medical officer of the United States Public Health Service, and is so certified by such officer, that any such alien was so afflicted at the time he was shipped or engaged and taken on board such vessel and that the existence of such affliction might have been detected by means of a competent medical examination at such time; * * * and pending departure of the vessel the alien shall be detained and treated in hospital under supervision of immigration officials at the expense of the vessel; * * *."

Both the persons and ships which are the subject-matter of Section 35 of the Immigration Act differ widely in description from the persons and ships in the Act of December 26, 1920. It is perfectly clear from the language of Section 35 that the kind of vessels referred to are *any passenger vessels,* and the kind of persons described are *any aliens employed on board.* Furthermore, the act of employing any alien afflicted with the specified disabilities and diseases on board any vessel is made unlawful only if it appears on examination that (a) such alien was so afflicted at the time he was shipped; and (b) the existence of such affliction might have been detected by a competent examination at that time.

The significant fact has already been referred to that the description of the class of persons to which the Act of December 26, 1920 applies is "alien seamen," not "any alien" employed on any vessel.

If Congress intended the Act of December 26, 1920 as an amendment of, or as a provision to be read and construed with, Section 35 of the Immigration Act, and to apply its provisions to all aliens and all vessels, it is reasonable to assume not only that similar descriptive language would have been used, but also that similar conditions would have been placed on the liability. If, as the Government contends, Section 35 of the Immigration Act formed the basis of the Act of 1920, the fact that Congress omitted the conditions with regard to affliction at the time of shipment, and detectability of the affliction at that time, is a strong indication that the new statute was not intended to be applied to the vessels covered by Section 35. The difference in the language of the two sections is sufficient to warrant a wholly different construction.

FOURTH POINT

THE UNCONSTITUTIONALITY OF THE STATUTE AS APPLIED TO OWNERS OF VESSELS OF THE UNITED STATES IS A SUFFICIENT REASON FOR AFFIRMING THE JUDGMENT OF THE CIRCUIT COURT OF APPEALS.

A. *The Act of December 26, 1920, as applied to owners of American vessels is unconstitutional, but as applied to foreign vessels is valid.*

There is no doubt of the constitutionality of this statute as applied to foreign ships and their owners; for the United States need not admit the vessels of foreign owners to its ports at all, and, therefore, if it does admit them, it may impose any regulation whatever as the condition of admitting them, as is clear from several of the cases cited by the petitioner in its brief, pp. 24-25.

Under the construction adopted by the Circuit Court of Appeals, no question of constitutionality would therefore arise. It is now urged as a further reason for construing the Act as not applying to American vessels, that if so applied it contravenes the guarantees of the Fifth Amendment to the Constitution of the United States:

> "Nor shall any person * * * be deprived of life, liberty, or property, without due process of law."

As applied to American vessels, this statute is an invalid exercise of the police power, not because it imposes liability without fault, but because it imposes liability without causation or causal connection.

The Circuit Court of Appeals did not find it necessary to decide this point, although it considered that, if applied to American vessels, the statute was "of doubtful constitutionality." *Opinion,* R. 12.

It should be noted that the Act of December 26, 1920, does not make anything unlawful, and imposes direct liability on the shipowner for loss resulting from the misconduct of the seaman, without any possibility of judicial determination.

It is not alleged in the complaint, and indeed under the terms of the statute it is not required to be alleged, that the seaman had the disease when shipped on the vessel, or that the shipowner knew he had the disease at any time, or that the contraction of the disease was incident in any way to the employment, or that the contraction of the disease by the seaman, or its prevention were within the control of the shipowner, or that the respondent had anything whatever to do with the loss incident to the seaman's diseased condition. The respondent is asked to pay for a loss caused by another's wilful misconduct, and occurring not only without his fault, but without his knowledge, consent or control, and is not allowed to deduct such expenses from the wages due to the seaman who made them necessary by his own wilful misconduct. The opportunity is not even given the shipowner to allege or prove any defense whatsoever.

An examination of the decisions on liability without fault, reveals that statutory liability should not be sustained under the police power, or any other power under the Constitution of the United States, against a defendant who cannot rea-

sonably be said to be in the chain of causation leading to the damage, or in control of the instrumentality which gives rise to it.

Under statutes making steam railroads liable for damage caused by fire on the right of way, or communicated by locomotives, irrespective of negligence, a plea that the railroad had nothing whatever to do with the particular fire, would of course be a good defense under such a statute. In fact, the plaintiff must plead and prove the causation of the fire by the railroad. *Fritz* v. *Railroad,* 1912, 243 Mo. 62, 77.

The basis of the validity of legislation of this character is found in the fact that the party sought to be charged has control over the instrumentality which causes the damage. Even though both parties are equally faultless, the legislature may properly consider it just that the duty of insuring private property against loss or injury caused by the use of fire in driving locomotives, should rest upon the railroad company which, for its own benefit, employs the instruments and creates the peril, rather than upon the owner of adjacent property who has no control over or interest in these instruments. *St. Louis & San Francisco Ry. Co.* v. *Mathews,* 1896, 165 U. S. 1, 26.

The full discussion of Mr. Justice Gray in the *Mathews* case and the numerous cases cited in the opinion, indicate clearly that although statutes imposing absolute liability for fires along or outside of the right of way are valid, a similar statute imposing liability irrespective of causation, as well as of negligence, would not be valid.

This doctrine was followed by the Supreme Court of Oregon in *Eastman* v. *Jennings-McRae Logging*

Co., 1914, 69 Oregon 1. The statute there under review authorized the recovery of damages from one from whose land fire escaped accidentally or unavoidably. The court held the statute invalid as taking property without due process of law. Pp. 13-17.

Furthermore, a statute making a railroad absolutely liable for all damage, such as the death of animals occurring on its right of way, without imposing any duty, or without providing for a judicial determination as to whether there has been a breach of duty, is clearly unconstitutional. *Zeigler* v. *South & North Alabama R. R. Co.*, 58 Ala. 594; *Birmingham Mineral R. R. Co.* v. *Parsons*, 100 Ala. 662; *Union Pacific Ry. Co.* v. *Kerr*, 19 Colo. 273; *Wadsworth* v. *Union Pacific Ry. Co.*, 18 Colo. 600; *Cateril* v. *Union Pac. Ry. Co.*, 2 Idaho 540; *Bielenberg* v. *Montana Union Ry. Co.*, 8 Mont. 271; *Atchison etc. R. R. Co.* v. *Baty*, 6 Neb. 37; *Jensen* v. *Union Pacific Ry. Co.*, 6 Utah 253; *Jolliffe* v. *Brown*, 14 Wash. 155; *Schenck* v. *Union Pacific Ry. Co.*, 5 Wyo. 430.

In *Ohio & Mississippi Rwy. Co.* v. *Lackey*, 1875, 78 Ill. 55, the statute under review required all railroad companys to pay coroner's inquest and burial expenses of "all persons who may die on the cars, or who may be killed by collision, or other accident occurring to such cars." In holding the statute unconstitutional as taking property without due process of law, the court said:

> "An examination of the section will show that no default, or negligence of any kind, need be established against the railroad company, but they are mulcted in heavy charges

> if, notwithstanding all their care and caution, a death should occur on one of their cars, no matter how caused, even if by the party's own hand. Running of trains by these corporations is lawful, and of great public benefit. It is not claimed that the liability attaches for the violation of any law, the omission of any duty or the want of proper care and skill in running their trains." P. 57.

The Illinois statute was held unconstitutional, not because liability was imposed without fault, but because liability was imposed for loss arising without the carrier's control.

The same basis of determining what is due process was relied on in two cases in which statutes, not in respect of railroads, but in respect of highway collisions, were held unconstitutional. *Camp* v. *Rogers,* 1877, 44 Conn. 291, and *Daugherty* v. *Thomas,* 1913, 174 Mich. 371. The statute under review in *Camp* v. *Rogers, supra,* provided that the owner of every vehicle should pay the damages, if the driver is unable to do so, caused by failure of the driver of *the vehicle* to obey certain sections of the highway laws.

The defendant, keeper of a livery stable, let a horse and carriage to a customer who bore no other relation to the defendant. The hirer of the team, while driving on the wrong side of the street negligently collided with the plaintiff's carriage.

The court found that the defendant could not be held, because, although owner, the defendant was not in either mediate or immediate control of the vehicle.

The word "owner" in the statute was held by the court to mean not the technical owner, but the person in possession and control of the vehicle, because if the word were construed literally, the statutory provision placing liability on such person was clearly unconstitutional. Pp. 296-297.

The court therefore adopted such a reasonable construction as would permit the statute to be upheld. P. 298.

In *Daugherty* v. *Thomas,* 1913, 174 Mich. 371, the defendant, owner of an automobile, left it in a shop for repairs. Two of the employees of the shop took the automobile out to test it, and struck and injured the plaintiff. There was no question that the persons in the car at the time of the accident were employees of the shopman, and were not employees of the owner. The taking of the machine out of the shop for testing was entirely without the owner's knowledge, or direction, or consent. Plaintiff recovered a judgment against the owner, the shopman, and the employees, under a statute imposing liability on owners of motor vehicles for negligent operation of such vehicles.

The court held that the word "owner" in the statute applied to the appellant, and that as so applied the Act was invalid under the Constitution of Michigan and of the United States, as taking property without due process of law.

The distinction between liability based on control of the instrumentality giving rise to the damage, and liability irrespective of control or causation, was followed in *Ex parte Hodges,* 1890, 87 Calif. 162, in which case the court had under review

an ordinance declaring ground squirrels to be a public nuisance, and providing:

> "All owners and occupants of lands within the County of Contra Costa are hereby required, within ninety days after the taking effect of this ordinance, to exterminate and destroy the ground squirrels on their respective lands, and thereafter to keep said lands free and clear therefrom."

In holding this ordinance unconstitutional, the court said:

> "But we are unable to see by what right or authority of law a board of supervisors can impose upon a land owner the burden and expense of exterminating animals *ferae naturae* on his own land, or elsewhere. * * * Certainly this authority cannot be so far extended as to require a land owner, under a penalty, to exterminate wild animals of which he is not the owner, and over which he cannot, in the nature of things, have any control or dominion." P. 164.

By the same reasoning, this respondent, who had no control over the contraction of the disease or the condition of the seaman, should not be held liable for the expenses of treatment as provided in the Act of 1920.

In relations between master and servant, although both by the maritime law and also under Workmen's Compensation Statutes, the employer is liable, without fault, for injury to the employee resulting from risks inherent in the employment, or due to its peculiar conditions, such liability does not extend to losses caused by the wilful miscon-

duct of the employee. Of course in one sense the employer is not the cause of certain industrial accidents, yet he is responsible for the creation of the risks which give rise to accidents of the kind covered by the doctrine of maintenance and cure in the maritime law and by the Workmen's Compensation Acts. The underlying theory of such legislation was exhaustively discussed in 1911 by Professor Wambaugh, *Workmen's Compensation Acts*, 25 Harv. L. Rev. 129; and has now been settled definitely by this court in *Cudahy* v. *Parramore*, 1923, 263 U. S. 418, 423-424. Mr. Justice Sutherland's opinion includes a clear criterion of whether or not a risk is one peculiar to the industry.

It is believed that every one of these statutes upheld by the courts has contained a provision exempting the employer from liability for the results of the employee's wilful misconduct; and in some of the decisions this point has been discussed. *Missouri Pacific Ry. Co.* v. *Castle*, 1912, 224 U. S. 541; *N. Y. Central R. R. Co.* v. *White*, 1917, 243 U. S. 188; *Hawkins* v. *Bleakly*, 1917, 243 U. S. 210; *Mountain Timber Co.* v. *State of Washington*, 1917, 243 U. S. 219, 233; *Arizona Employers' Liability Cases*, 1919, 250 U. S. 400.

In *New York Central R. R. Co.* v. *White*, *supra*, Mr. Justice Pitney said:

> "Aside from injuries intentionally self-inflicted, for which the statute under consideration affords no compensation, it is plain that the rules of law upon the subject, in their bearing upon the employer's responsibility, are subject to legislative change." P. 200.

Under the maritime law it is well settled that a shipowner is liable, irrespective of negligence, for the maintenance and cure of seamen who are injured or become sick in the course of the employment. *The Osceola*, 1903, 189 U. S. 158. As in the case of the express provisions of Workmen's Compensation Acts, the maritime law holds that seamen suffering from venereal disease, or from injury due to their own wilful misconduct, are not entitled to maintenance and cure. *Pierce* v. *Patton*, 1833, Gilp. 435; Fed. Case No. 11,145 (19 F. C. 636); *Chandler* v. *The Annie Buckman*, 1853, 21 Betts D. C. (MS.) 112; Fed. Case No. 2591a (5 F. C. 449); *The Alector*, 263 Fed. 1007, 1008; *The Bouker No. 2*, C. C. A. 2nd, 1917, 241 Fed. 831, 833 and note; certiorari denied, 245 U. S. 647.

It is submitted therefore that one of the fundamental conditions for the valid imposition of liability without fault is that the party sought to be held must be either directly in the chain of causation, or must be so related to the immediate cause of the injury that he may be said to have control of the instrumentality causing the loss. It is submitted further that each of these conditions is lacking in the Act of December 26, 1920. Neither in the pleadings, nor in the words of the statute, nor in commen sense is there anything to suggest that the condition of the seaman in this case was caused mediately or immediately by the respondent, or that the condition of the seaman was in any way within the control of the respondent, or that the contraction of such a disease was a peculiar risk of the employment, or one inherent in the industry. Therefore, the application to this respondent of a statute which does not make anything unlawful,

and which does not make control over or causation of the acts giving rise to the loss a condition of liability, is an unreasonable and oppressive, and therefore invalid effort to exercise the police power in contravention of the Fifth Amendment of the Constitution.

This argument is not met by the cases cited in the petitioner's brief, pp. 24-25, in none of which was the constitutionality of the Act of December 26, 1920, upheld or even considered; because the objection to the application of the Act of December 26, 1920, was not among the objections to constitutionality urged or considered in any of those cases, which were of wholly different nature.

B. *A statute must be construed, if possible, so as to avoid even doubt as to its constitutionality.*

Where a statute on one construction violates constitutional principles, and on another can be made consistent with them, that construction should be adopted which will save the statute from invalidity, because it will be presumed that the legislature intended a valid enactment. Cooley, *Constitutional Limitations*, p. 184; *Camp* v. *Rogers*, 44 Conn. 291.

This principle is well settled in this court. *U. S.* v. *Delaware & Hudson Co.*, 1909, 213 U. S. 366, 407-408; *U. S.* v. *Jin Fuey Moy*, 1916, 241 U. S. 394, 401; *Baender* v. *Barnett*, 1921, 255 U. S. 224, 226; *Texas* v. *Eastern Texas R. R. Co.*, 1922, 258 U. S. 204, 217; *Panama R. R. Co.* v. *Johnson*, 1924, 264 U. S. 375, 390. It has been summarized by Mr. Justice Holmes as follows in *U. S.* v. *Jin Fuey Moy, supra:*

> "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score. P. 401.

This language was quoted with approval so recently as April 13, 1925, in *Linder* v. *U. S.*, No. 183 of the October Term, 1924.

If the present statute is construed as not applying to seamen, of whatever individual nationality, who are employed on vessels of the United States, the Act does not violate constitutional principles, and it therefore was correctly so construed by the court below.

LAST POINT

THE JUDGMENT OF THE CIRCUIT COURT OF APPEALS SHOULD BE AFFIRMED.

October 1, 1925.

Respectfully submitted,

MARK W. MACLAY,
JOHN TILNEY CARPENTER,
Counsel for Respondent.

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In the Supreme Court of the United States

OCTOBER TERM, 1925

No. ——

UNITED STATES OF AMERICA, OWNER OF THE STEAMSHIP "SAGAPORACK," PETITIONER

v.

NORFOLK DREDGING COMPANY, A CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

The United States of America respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fourth Circuit in the case at bar, and for reasons therefor respectfully shows:

QUESTIONS INVOLVED

The questions involved herein are:

(1) Can a steamship which, while carefully navigating her own side of the channel in inland waters of the United States, observes a tug and tow dead ahead and about a mile distant, and gives a signal of one blast of her whistle as required by the Inland Rules, which the tug immediately answers with one blast, be held responsible for a

collision which results from the failure or inability of the tug to comply with the agreed passing signals, on the theory that the steamer should have blown two blasts and starboarded her helm?

(2) Can the pilot of the steamship be condemned for obeying a positive rule of law?

(3) Was this a case for the application of the General Prudential or Special Circumstance Rule?

THE FACTS

This suit in admiralty grew out of a collision between the steamship *Sagaporack,* owned by the United States, and certain mud scows in tow of the tugs *Albemarle* and *Campostella,* all owned by the Norfolk Dredging Company. The collision occurred in the Elizabeth River, off Sewell's Point, Virginia, at 10.19 p. m. October 30th, 1923. The channel from Lambert's Point to Bush Bluff light runs north one-quarter west. From Bush Bluff northward the channel runs north three-quarters east and is perfectly straight for more than three miles. It was in this reach of the channel that the collision occurred. The channel is of the uniform width of 600 feet, the middle 400 feet being dredged to a depth of 40 feet. The *Sagaporack* was bound out from Norfolk. The flotilla which collided with her consisted of two steam tugs and four mud scows in a single column (tandem), the whole being 1,230 feet in length. This flotilla was bound in toward Norfolk. It passed inside of Fort

Wool and cut across the flats east of the channel, keeping to the eastward of the line of buoys marking the east side of the channel until shortly before the collision, when it started across the channel on a long diagonal.

As the steamship *Sagaporack* rounded Bush Bluff and straightened down the channel, she observed the leading tug coming up in the opposite direction, then dead ahead and showing both her side lights, and both of her own lights were visible to the master of the tug. The steamer was holding to the east side of the channel (her own side). On observing the tug, the steamship blew one blast of her whistle, which was immediately answered with one blast by the tug. The steamer and the leading tug were about a mile apart when the signals were exchanged. The *Sagaporack* proceeded slowly down her own side of the channel. The tug did not promptly alter her course to conform to the agreed passing signals, but continued for an appreciable time to show both side lights. When the tug did go to starboard, it was too late to get the scows out of the way. Thereupon the engines of the steamer, then moving slow ahead, were stopped and reversed, the appropriate whistle signal being given. To further check her headway her port anchor was let go. She was in the act of bringing up on her anchor chain and nearly dead in the water when the leading scow struck her on the starboard side of the stem, severing the hawser at the tug's

bits. Whereupon all the scows drifted along the starboard side of the steamer and went upon the flats on the east side of the channel.

There were two trials in the District Court, the only point in dispute being the place in the channel at which the collision occurred. The libellant contended that it occurred on the west side of the channel and respondent that it occurred on the east side of the channel. The District Court found that the collision occurred on the east side of the channel and that tugs and tow were on the wrong side. It held the steamship free from fault. (Opinion, R. 101–107.)

The Circuit Court of Appeals approved this finding of fact. (R. 118.)

That court, however, Woods, Circuit Judge, dissenting, held that in the situation above described the *Sagaporack* should not have inaugurated a port-to-port passage, but should have blown two blasts and starboarded her helm.

The Inland Rules, Article 18, Rule 1, regulating the situation of these vessels at the time signals were exchanged, provide:

> When steam vessels are approaching each other head and head, that is, end on, or nearly so, it shall be the duty of each to pass on the port side of the other; and either vessel shall give, as a signal of her intention, one short distinct blast of her whistle, which the other vessel shall answer promptly by a similar blast of her whistle,

and thereupon the vessels shall pass on the port side of each other.

Petitioner is advised and believes that the judgment of the Circuit Court of Appeals is erroneous, and that this Court should require this case to be certified to it for review and determination in conformity with the provisions of Section 240 of the Judicial Code, as amended by the Act of February 13, 1925.

General reasons for granting the writ

(1) The decision of the Circuit Court of Appeals on the important question of general law involved in this case is in conflict with both the weight of authority and the decisions of this Court.

(2) The decision of the Circuit Court of Appeals, if unreversed, will leave pilots and masters of steam vessels in doubt as to whether they are to obey definite rules of the road prescribed by law, making it a matter of option, which the courts, and particularly this Court, have said they may not exercise.

For these reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

WILLIAM D. MITCHELL,
Solicitor General.

JULY, 1925.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Opinion of the United States Circuit Court of Appeals

The opinion in this cause has not yet appeared in the Federal Reporter. It will be found in the 1925 American Maritime Cases, page 736, and printed copies have been sent up with the record. (R. 116.)

Grounds of jurisdiction

This is an admiralty cause. The suit was brought in the United States District Court for the Eastern District of Virginia in a cause of collision, civil and maritime. From the judgment of that court dismissing the libel, libellant appealed to the United States Circuit Court of Appeals for the Fourth Circuit. That court on the 18th day of April, 1925, entered a judgment or decree modifying the decree of the District Court. (R. 124.) A petition for rehearing was filed May 4th, 1925. See order (R. 144) and petition (R. 126). On May 9th, 1925, the rehearing asked for was denied. (R. 145.)

Jurisdiction is invoked under Article III, Section 2, of the Constitution of the United States and the Judicial Code, Section 24, Subsection 3, and Sections 128 and 240, as amended by the Act of February 13, 1925.

Authorities to sustain the jurisdiction in admiralty are, of course, unnecessary.

STATEMENT OF THE CASE

The record in this case presents the question whether when a steamship, prudently navigating her own side of the channel in inland waters, observes a steam tug and tow approaching dead ahead and seasonably gives to the tug a signal of one blast, which the tug immediately accepts and answers with one blast, and a collision follows due to the failure or inability of the tug to conform to the agreement to pass port-to-port, the steamship can be held at fault on the theory that she should not have inaugurated a port-to-port passage.

Summarized, the facts are as follows:

The steamship *Sagaporack* while lawfully navigating her own side of the channel of the Elizabeth River at night observed two tugs and a tow in single column coming up the channel in the opposite direction, tugs and tow being on the wrong side of the channel directly ahead of the steamer and about a mile distant. The steamship, in obedience to Rule 1, Article 18, of the Inland Rules, gave a signal of one blast of her whistle, which the leading tug immediately answered with one blast. The tugs did not promptly alter their course to starboard so as to conform to the agreed passing signals. Observing this, the steamship, which was already at slow speed, stopped and reversed and dropped her anchor. Meantime, the tugs had sheered to starboard and cleared the

steamer, but left the scows still dead ahead. The latter continued on their course and the leading scow struck the steamer on the starboard side of the stem, doing considerable damage to the scow and none to the steamer.

For a more detailed statement of the facts, accompanied by references to the Record, we beg leave to refer to the Statement of Facts contained in the petition.

On these facts the District Court held the *Sagaporak* free from fault. In this view, Woods, Circuit Judge, concurred.

The majority of the Circuit Court of Appeals, however, held that the *Sagaporack* in the circumstances above narrated should not have inaugurated a port-to-port passage, but instead should have blown a signal of two blasts and starboarded her helm.

The question is therefore fairly raised whether this was a case for the application of the General Prudential or Special Circumstance Rule.

Errors intended to be urged

The errors which petitioner urges herein as grounds for the granting of the writ of certiorari and for the reversal of the decision of the Circuit Court of Appeals and modification of the decree thereon are:

(1) The Circuit Court of Appeals erred in holding that the steamship *Sagaporack* in the circumstances of this case should have blown a

signal of two blasts and starboarded her helm, instead of blowing a signal of one blast, as required by the rules.

(2) The court erred in failing to hold that the steamship *Sagaporack* was free from fault and in failing to affirm the decree of the District Court.

(3) The court erred in failing to adhere to the rule laid down by this Court, that where one of two colliding vessels is grossly at fault, all doubts regarding the management of the other vessel should be resolved in her favor.

ARGUMENT

I

The decision of the Circuit Court of Appeals in this case involves a misapplication of the General Prudential Rule or Special Circumstance Rule

The first two errors assigned are substantially the same and will be discussed together under the above head.

The majority opinion of the Circuit Court of Appeals in this case condemns the pilot of the *Sagaporack* for obeying a positive rule of law.

The Inland Rules, Article 18, Rule 1, provide:

> When steam vessels are approaching each other head and head, that is, end on, or nearly so, it shall be the duty of each to pass on the port side of the other; and either vessel shall give, as a signal of her intention, one short and distinct blast of her whistle, which the other vessel shall answer promptly by a similar blast of her whistle,

> and thereupon such vessels shall pass on the port side of each other. But if the courses of such vessels are so far on the starboard of each other as not to be considered as meeting head and head, either vessel shall immediately give two short and distinct blasts of her whistle, which the other vessel shall answer promptly by two similar blasts of her whistle, and they shall pass on the starboard side of each other.

These rules are mandatory.

In "The Rules of the Road at Sea," by LaBoyteaux, at page 111, it is said:

> The manner of passing is not in any sense optional, nor does the rule permit of any deviation from its express requirements. On the contrary, its terms are positive and mandatory.

The same author, at page 6, says:

> So imperative is the obligation to obey the statutory rules that it has long since become a settled principle of law, established by the courts of both America and England, that a breach of them constitutes such a fault as to throw upon the offending vessel the burden of proving, not merely that the breach might not have been one of the causes of the collision, or that it probably was not, but that it could not have been; citing:
>
> *The Pennsylvania*, 19 Wall. 125;
> *Belden* v. *Chase*, 150 U. S. 674;
> *The Martello*, 153 U. S. 64;
> *The Britannia*, 153 U. S. 130;

Lie v. *San Francisco & Portland S. S. Co.*, 243 U. S. 291;

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The Corinthian, 11 Asp. M. C. (N. S.) 264;

The Beryl, 9 Prob. Div. 137;

The Voorwarts–The Khedive, L. R. 5 App. Cases 876.

It is respectfully submitted that the majority opinion of the Circuit Court of Appeals fails to recognize the obligatory character of the rule. It refers to the port to port passage as "Ordinarily preferable and generally the usual one for vessels meeting each other." Under the decisions, as above shown, it is not optional with the pilot whether he will pass port to port in such a situation. The rule is mandatory, and he who departs from it does so at his peril.

While at the time of the exchange of signals in this case the *Sagaporack* and the leading tug were approaching each other head and head, or nearly so, so that each could see both the other's running lights, yet it developed in the evidence that the tugs and scows were in fact in the act of crossing from the east to the west side of the channel on a long diagonal.

What the majority of the court below holds is, in reality, that the *Sagaporack* should have crossed the bow of the leading tug.

The majority opinion does not expressly refer to the Special Circumstance Rule, but it is assumed that this was in mind when the court said (R. 120):

> While ordinarily the port-to-port passage is the preferable and generally the usual one for vessels meeting each other, still where there are circumstances such as in this case which would make the starboard passage the proper and safer one, it, of course, should be adopted.

The General Prudential or Special Circumstance Rule had no application to the situation of these vessels at the time of the exchange of signals.

This rule is found in Article 27 of the Inland Rules and is identical with Article 27 of the International Rules and with Pilot Rule XI. It reads as follows:

> In obeying and construing these rules due regard shall be had to all dangers of navigation and collision and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger.

By its terms this rule permits a departure from the definite rules only to "avoid immediate danger." It is an emergency rule, to be resorted to at the last moment to avoid not a remote or possible danger but *immediate* danger.

It has been called the rule of "*Sauve qui peut.*" (*Hughes on Admiralty,* Second Ed., p. 292.)

Discussing the rule LaBoyteaux, at page 170 of "The Rules of the Road at Sea," says:

> This article for exceptional cases is operative only in such cases. It does not excuse a departure from the definite rules, unless and until such departure is imperative, if imminent danger is to be avoided.

In *The Breakwater,* 155 U. S. 252, at page 264, Mr. Justice Brown said:

> Where rules of this description are adopted for the guidance of seamen who are unlearned in the law and unaccustomed to nice distinctions, exceptions should be admitted with great caution, and only when imperatively required by the special circumstances mentioned in Rule 24, which may exist in any particular case, rendering a departure from them necessary in order to avoid immediate danger. The moment the observance or nonobservance of a rule becomes a matter of doubt or discretion, there is manifest danger, for the judgment of one pilot may lead to observe the rule, while that of the other may lead him to disregard it.

The obligation imposed to obey these rules is imperative, and those violating them, except when necessary to avoid immediate danger, must bear the consequences if damages ensue. He who departs from them assumes the burden of justifying his conduct. (*The Breakwater,* 155 U. S. 252; *The Delaware,* 161 U. S. 459, 466; *The Albert Dumois,* 177 U. S. 240, 249.)

> I am of the opinion that departure from article 18 is justified when such departure is the one chance still left of avoiding danger which otherwise is inevitable. [*The Benares,* 5 Asp. M. C. (N. S.) 171, 174.]

In the *Albert Dumois, supra,* in a situation very similar to that in the instant case, the Supreme Court held the *Dumois* at fault for doing what the majority of the court in this case say the *Sagaporack* should have done.

The *Dumois,* a Norwegian steamship, bound up the Mississippi River below New Orleans and from 250 to 500 feet from the east bank, made out directly ahead and about one-half mile distant the white and colored lights of the steamer *Argo* coming down the river. She also saw a cluster of white lights belonging to a tug and two luggers inside of the *Argo*—that is, between the *Argo* and the east bank of the river. These, as it turned out, were in fact moored to the east bank.

In this situation she blew two blasts and starboarded. A collision resulted.

On behalf of the *Dumois* it was argued that she was justified under the Special Circumstance Rule in departing from the rule requiring a port-to-port passage by her own proximity to the east bank and by the lights seen between the *Argo* and the east bank.

In disposing of this contention, the Court, through Mr. Justice Brown, said (pp. 249–251):

Her theory of the case was, and the entire testimony of her watch showed, that the *Argo* was approaching her "end on, or nearly end on," within the meaning of rule 18, which declares that "if two vessels under steam are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other." Notwithstanding this, however, the wheel of the *Dumois* was put to starboard and a signal of two whistles blown to the *Argo,* manifesting an intention on the part of the *Dumois* to sheer out into the river and pass the *Argo* starboard to starboard. Her excuse for doing this was her own proximity to the east bank and a cluster of white lights belonging to a tug and two luggers inside of the *Argo,* and in fact moored to the east bank of the river.

We can not, however, accept this as a "special circumstance" within the meaning of rule 24 rendering a departure from rule 18 necessary "to avoid immediate danger," since if there were any danger at all it was not an immediate one, or one which could not have been provided against by easing the engines of the *Dumois* and slackening her speed. * * * The fact put forth by the pilot of the *Dumois,* that the *Argo* seemed so close to the luggers that she appeared to be one of them, (although contradicted by the testimony of the libellant that the *Argo* was in the middle of the river,) was one which undoubtedly called for cau-

> tion on the part of the *Dumois,* but it did not involve an immediate danger which justified a departure from the general rule.

At the time of the exchange of signals between the *Sagaporack* and the leading tug there was no such immediate danger as to justify the *Sagaporack* in departing from the statutory rule. Had her pilot blown two blasts and starboarded, thus attempting to cross the bow of the leading tug, she would certainly have been held at fault. Instead he did what the law required him to do, namely, blew one blast; and when the tug answered with one blast, his own judgment that a port-to-port passage was feasible, was confirmed by the one person in the best position to know the nature of the tow and what could be done with it.

Had the tug, instead of consenting to the port-to-port passage, blown danger signals, the *Sagaporack* could have been stopped in time to avoid a collision.

The situation at this time and the rights of the respective vessels growing out of it are, we respectfully submit, accurately stated by his Honor Judge Woods, in the dissenting opinion (R. 121):

> The tugs with their tow were on the wrong side of the channel. The one-blast signal of the steamship *Sagaporack* was an inquiry addressed to the tugs if they were willing to make the usual port-to-port passing and if they could safely do so. Their answer of one blast was an assurance to the steamship that they could and would direct

their course to starboard so as to make the port-to-port passing safely. The steamship had a right to rely on this assurance until it became manifest to her navigator that the tugs had given a wrong signal and that they could not or would not so navigate as to make the proposed passing safe. I think when this danger became evident the navigator of the steamship did everything possible to prevent the collision in an emergency brought about solely by the fault of the master of the tugs.

II

The decision of the Circuit Court of Appeals in this case is not in harmony with the rule laid down by this Court, that where one of the vessels is grossly at fault, all doubts regarding the management of the other vessel should be resolved in her favor

This Court has repeatedly held that where one of two colliding vessels is grossly at fault, any doubts regarding the management of the other vessel, or the contribution of her faults, if any, to the collision should be resolved in her favor.

The Umbria, 166 U. S. 404.
The Victory and The Plymothian, 168 U. S. 410.
The City of New York, 147 U. S. 72.
The Ludvig Holberg, 157 U. S. 60.

In the instant case the faults on the part of tug and tow were obvious and gross.

They consisted (*a*) in the negligent manner in which the tow was made up, (*b*) in navigating

the wrong side of the channel, (*c*) in accepting a proposal to pass port-to-port if not in position to comply, (*d*) in failing to answer the steamer's one blast with danger signals if unable to effect a port-to-port passage, and (*e*) having agreed to a port-to-port passage, in failing to take immediate measures to comply.

In view of these gross faults, any doubts regarding the management of the steamer should, we submit, be resolved in her favor.

Whatever of danger was involved in the situation was not of her creation.

For the foregoing reasons it is respectfully submitted that a writ of certiorari should be granted in this case, and that the decree of the Circuit Court of Appeals, in so far as it holds the steamship *Sagaporack* at fault, should be reversed.

Respectfully submitted.

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